ASYLUM LAW

IN THE TENTH CIRCUIT

SELECTED TOPICS

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ADMINISTRATIVE NOTICE

Neither the INA nor the regulations explicitly authorize Immigration Judges to take administrative notice of commonly known facts outside the record of proceedings, but the Board and circuit courts have recognized Immigration Judges' ability to take administrative notice of certain types of evidence. *See, e.g., Vasha v. Gonzales*, 410 F.3d 863, 874 n.5 (6th Cir. 2005) (explaining that administrative notice is limited to commonly known facts or matters within the Immigration Judge's "expertise or experience in handling asylum claims"); *Singh v. Ashcroft*, 393 F.3d 903, 905–07 (9th Cir. 2004) (acknowledging "the ordinary power of any court to take notice of facts that are beyond dispute"); *Medhin v. Ashcroft*, 350 F.3d 685, 690 (7th Cir. 2003) (stating that the Immigration Judge "may take administrative notice of changed conditions in the alien's country of origin"); *Matter of Chen*, 20 I&N Dec. 16, 18 (BIA 1989) (noting that the Immigration Judge or Board "may take administrative notice of changed circumstances in appropriate cases, such as where the government from which the threat of persecution arises has been removed from power"); *see also* 8 C.F.R. § 1003.36 ("The Immigration Court shall create and control the Record of Proceedings."). Moreover, adjudicators may draw reasonable inferences from administratively noticed evidence that "comport with common sense." *See Kapcia v. INS*, 944 F.2d 702, 705 (10th Cir. 1991) (quoting *Kaczmarczyk v. INS*, 933 F.2d 588, 594 (7th Cir. 1991)).

Examples of information that the Court may take judicial notice of can include:

(1) Commonly known facts;
(2) Current events;
(3) Country conditions;
(4) Official documents (out limits have not been defined by BIA or courts);
(5) Judicial experience derived from institutional expertise (unresolved issue).

Cases:

Kapcia v. INS, 944 F.2d 702, 705 (10th Cir. 1991) (holding that the BIA could take official notice of commonly acknowledged facts, and technical or scientific facts that are within the agency's area of expertise). In exercising official notice, administrative agencies may consider commonly acknowledged facts. *Id*.

Lobos v. INS, 22 Fed. App'x 979, 980 (10th Cir. 2001) (finding that immigration judges or the BIA may take administrative notice of changed circumstances in appropriate cases, such as whether the government in power and the applicant's alleged persecutor has been removed).

Otero de Ocana v. INS, No. 95-9506, 1996 U.S. App. LEXIS 490, at *1 (10th Cir. Jan. 16, 1996) (holding that the BIA properly took administrative notice of changed conditions in Nicaragua, based on the recent elections, concluding that the aliens' fear of persecution was not reasonable because the Sandanistas no longer governed Nicaragua).

Matter of Gomez-Gomez, 23 I&N Dec. 522, 525 (BIA 2002) (leaving unanswered the issue of whether an Immigration Judge could properly take administrative notice of circumstances arising in other cases or respecting the practice in her region whereby adult aliens apprehended with juveniles would be accorded more favorable treatment in terms of the Service's release policy).

Matter of Chen, 20 I&N Dec. 16, 18 (BIA 1989) (recognizing authority of immigration judges to take judicial notice of changed circumstances in asylum and withholding claims).

APPLICATIONS WITH USCIS

An immigration judge only has jurisdiction over an asylum application after a charging document has been filed with the court. 8 C.F.R. §§ 208.2(b), 1003.14(b). An asylum application filed with the immigration court also is known as a "defensive application."

USCIS's Refugee, Asylum, and International Operations "shall have initial jurisdiction over an asylum application filed by an alien physically present in the United States or seeking admission at a port-of-entry." 8 C.F.R. §§ 208.2, 1208.2(a). USCIS shall also have initial jurisdiction over credible fear determinations under § 208.30 and reasonable fear determinations under § 208.31. 8 C.F.R. § 208.2.

While in removal proceedings, an alien is entitled to apply for other forms of relief before USCIS. However, an immigration judge should be aware that USCIS may have sole jurisdiction over certain applications, including but not limited to: fiancé visa (I-129F), petition for an alien relative (I-130), special immigrant (I-360), refugee/asylee relative petition (I-730), naturalization (N-400), U nonimmigrant status (I-918). USCIS has initial jurisdiction over adjustment of status applications (I-485), unless the applicant is an arriving alien then USCIS has sole jurisdiction. 8 C.F.R. 1245.2.

Cases:

Matter of Sanchez-Sosa, 25 I&N Dec. 807 (BIA 2002) (recognizing that a respondent's requested for a continuance could be granted in removal proceedings, if for the purpose of having a U visa application adjudicated and if there is a *prima facie* approvable application actually pending before USCIS). In determining whether good cause exists to continue removal proceedings to await the adjudication of an alien's pending U non-immigrant visa petition, we consider (1) the response of the DHS to the alien's motion to continue; (2) whether the underlying visa petition is prima facie approvable and the reason for the continuance and other procedural factors. *Id*. However, the Court may deny a request for a continuance where an alien seeks to use the U visa primarily as a means to unnecessarily delay removal proceedings. *Id*. at 815.

Sample Language

(b) (5)

[redacted]

(b) (5) [redacted]

ADMISSIONS AND CONCESSIONS BY PARTIES

A distinct and formal admission made before, during or even after a proceeding by an attorney acting in his professional capacity binds his client as a judicial admission. *Matter of Velasquez*, 19 I&N Dec. 377, 382 (BIA 1986). An Immigration Judge may decline to accept admissions and concessions of counsel, particularly where the admitted facts are contradicted by substantial record evidence as a judge need only accept an admission or concession when he or she "is satisfied that no issues of law or fact remain." 8 C.F.R. § 240.10(c).

Admissions, such as pleadings, may be withdrawn under the following considerations: (1) the admission was not true; (2) the admission was not correct; (3) the admission was the result of unreasonable professional judgment (ineffective assistance); (4) the admission produces an unjust result; or (5) there were egregious circumstances. *Matter of Velasquez*, 19 I&N Dec. at 383 (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

Parties may not stipulate or concede legal conclusions, such as whether the applicant has met the statutory requirements for eligibility, as it requires an independent review by the Immigration Judge. *Matter of A-B-*, 27 I&N Dec. 316, 334 (A.G. 2018) (citing *Matter of A-*, 4 I&N Dec. 378, 384 (BIA 1951)).

Cases:

Matter of Velasquez, 19 I&N Dec. 377 (BIA 1986) (finding when an admission is made as a tactical decision by an attorney in a deportation proceeding, the admission is binding on the alien client and may be relied upon as evidence of deportability).

ASYLUM

Asylum is a discretionary form of relief, unlike withholding and protection under the CAT, available to aliens physically present or arriving in the United States, who apply for relief in accordance with sections 208 or 235(b) of the Act. INA § 208(a)(1); *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 444 (1987).

An applicant must meet the definition of a "refugee," defined as: any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42); *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481 (1992); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 230 (BIA 2014).

BIOMETRICS

An Immigration Judge may not grant relief until background checks are complete. 8 C.F.R. § 1003.47 (g).

The Immigration Judge, on the record, must inform the applicant: (1) that DHS has provided him or her with the biometrics instructions form; (2) of the date he or she must comply with those instructions; and (3) that failure to comply with those instructions or later provide biometrics or other biographical information to DHS, without good cause, will constitute an abandonment of the application for relief and an order will be entered dismissing the application. 8 C.F.R. § 1003.47(c); OPPM 05003 at 3 (Mar. 28, 2005).

Cases:

Matter of D-M-C-P-, 26 I&N Dec. 644 (BIA 2015) ("It improper to deem an application for relief abandoned based on the applicant's failure to comply with the biometrics filing requirement where the record does not reflect that the applicant received notification advisories concerning that requirement, was given a deadline for submitting the biometrics, and was advised of the consequences of his or her failure to comply.").

Matter of R-R-, 20 I&N Dec. 547 (BIA 1992) (applications for benefits under the Act are properly deemed as abandoned when the alien fails to timely file).

Sample Language

(b) (5) [redacted]

BURDEN

An asylum applicant has the burden of showing eligibility for asylum. INA § 240(c)(4); 8 C.F.R. § 1208.13(a).

If an alien's application is fatally flawed in one respect, an Immigration Judge need not examine the remaining elements of the asylum claims. *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018).

CLAN MEMBERSHIP/INDIGENOUS PERSONS

Membership in a clan can constitute membership in a "particular social group" within the meaning of section 208(a) of the Act, based on evidence kinship ties and linguistic commonalities. *Matter of H-*, 21 I&N Dec. 337 (1996) (citing INS, U.S. Department of Justice,

Basic Law Manual, U.S. Law and INS Refugee Asylum Adjudications 48 *in* 8 Charles Gordon et al., *Immigration Law and Procedure* (Matthew Bender rev. ed. 1996) (Special Supp. 1995)).

Cases:

Matter of Hussein, Interim Decision -- (BIA 1996) (Somali clan membership may for a PSG).

--, (b) (6) (BIA May 29, 1996) (Marehan sub-clan and Somali clan membership may form the basis of a PSG).

(b) (6) (BIA Jan. 21, 2011) (an indigenous Maya Quiche demonstrated sufficient evidence to reopen his asylum case).

Sample Language

(b) (5)

CONFIDENTIALITY

Pursuant to the regulations, information contained in an asylum application and hearing is confidential. 8 C.F.R. § 1208.6.

Sample Language

(b) (5)

CONTINUANCES

An applicant may be entitled to a reasonable number of continuances under due process of law, but must establish that "good cause" exists to continue removal proceedings. *See* 8 C.F.R. §§ 1003.29, 1240.6. The decision to grant or deny a continuance is within the discretion of the IJ if good cause is shown. *Matter of Hashmi*, 24 I. & N. Dec. 785, 785 (BIA 2009) (recognizing that there is a presumption towards good cause where an alien has established that he is the

beneficiary of an actual pending immigrant visa petition and is likely to succeed on an application for adjustment of status); *Matter of Perez- Andrade*, 19 I&N Dec. 433 (BIA 1987); *Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010). Good cause for a continuance is not demonstrated to await the results of a collateral event which may occur at some indefinite time in the future and the outcome of which may or may not be favorable to the respondent. A continuance would typically be warranted where the Immigration Judge determines that the applicant was not aware of a unique piece of evidence that is essential to meeting the burden of proof.

In deciding whether to grant a continuance, the IJ should keep in mind that an applicant is entitled to a full and fair hearing. *Matter of Namio*, 14 I&N Dec. 412 (BIA 1973); *Matter of Santos*, 19 I&N Dec. 105 (BIA 1984) (finding procedural error prejudiced the alien).

The Court may deny a motion to continue on the basis that pending post-conviction motions or other collateral attacks do not negate the finality of a conviction for immigration purposes unless and until the conviction is overturned. *See Jimenez-Guzman v. Holder*, 642 F.3d 1294, 1297 (10th Cir. 2011).

Cases:

Luevano v. Holder, 660 F.3d 1207, 1210 (10th Cir. 2011) (denying a petition for review on the basis that there was no precedent requiring an IJ to grant an indefinite continuance so that a petitioner could stay in the country awaiting eligibility for adjustment of status).

Jimenez-Guzman v. Holder, 642 F.3d 1294, 1297 (10th Cir. 2011) (finding that denial of Mexican alien's motion to continue his immigration case while he pursued appeal of state-court decision denying his motion to withdraw guilty plea on basis of ineffective assistance of counsel in heroin prosecution was not abuse of discretion, and where IJ had already continued removal hearing several times while alien awaited state trial court's disposition of his post-conviction motion, and record belied alien's claim of ineffective assistance of counsel for failure to advise of immigration consequences of plea).

Seka v. Sessions, 714 Fed. App'x 901 (10th Cir. 2017) (denial of additional continuance in asylum proceedings to allow alien, a native and citizen of the Ivory Coast, to obtain counsel was reasonable; IJ told alien at his first appearance that he had right to retain counsel, and provided him list of pro bono organizations that might represent him for little or no cost, and merits hearing was continued several times after that, during which time alien could have retained counsel or sought pro bono legal services).

Llanos v. Holder, 565 Fed. App'x 675, 675 (10th Cir. 2014) (finding that the court reviews the decision to deny a continuance for an abuse of discretion).

Chavez-Vasquez v. Holder, 572 F. App'x 627, 628 (10th Cir. 2014) (denying request for continuance where, under federal law, a respondent became subject to removal upon his conviction for burglary).

Esparza-Recendez v. Holder, 526 Fed. App'x 886, 892 (10th Cir. 2013) (affirming denial of continuance where an IJ continued hearings no less than four times in a three-month period so as to enable the parties to determine whether a respondent had been convicted of two or more crimes of moral turpitude).

Castillo-Torres v. Holder, 394 Fed. App'x 517, 522 (10th Cir. 2010) (unpublished) (holding only if the decision was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis, will a court grant a petition for review on that basis).

Maphilindo v. Holder, 323 Fed. App'x 659 (10th Cir. 2009) (denial of motion to continue asylum and withholding of removal proceedings did not result in fundamentally unfair hearing in violation of due process due to lack of counsel, where Indonesian alien had almost one year to secure counsel).

Matter of Sanchez-Sosa, 25 I&N Dec. 807, 815 (BIA 2012) (recognizing that a continuance should not be granted where it is being sought "as a dilatory tactic to forestall the conclusion of removal proceedings").

Matter of Adetiba, 20 I&N Dec. 506, 508 (BIA 1992) (noting that the pursuit of post-conviction relief in state court does not affect the finality of the conviction for federal immigration purposes).

Matter of Sibrun, 18 I&N Dec. 354, 356-57 (BIA 1983) ("[A]n Immigration Judge's decision denying the motion for continuance will not be reversed unless the alien establishes that that denial caused him actual prejudice and harm and materially affected the outcome of his case.").

(b) (6) (BIA Nov. 21, 2014) (finding that the two classes of people, those with family-based petitions and those seeking to overturn criminal convictions, are not similarly situated in a way that would allow a respondent to establish an equal protection claim under the latter category) (citing *Gutierrez v. Holder*, 662 F.3d 1083, 1090 n.11 (9th Cir. 2011) (rejecting an alien's equal protection claim because he did not show that his treatment "differed from that of similarly situated persons")).

Sample Language

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(b) (5)
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CONVENTION AGAINST TORTURE

Article 3 of the Convention Against Torture prohibits the return of an alien to a country where it is more likely than not that he will be subject to torture. *See* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988); 8 C.F.R. §§ 1208.16, 1208.17, 1208.18.

An applicant for protection under the Convention Against Torture (CAT) must show it is more likely than not he will be subject to torture in his country by, at the instigation of, or with the acquiescence of a public official or one acting in an official capacity. 8 C.F.R. §§ 1208.16-.18. Torture is defined as: (A) an intentional infliction of severe pain or suffering, whether physical or mental; (B) for the purpose of obtaining information or a confession, punishment of an act or a suspected act, intimidation, coercion, or for any reason based on discrimination of any kind; provided that (C) "such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1); *Matter of M-B-A-*, 23 I&N Dec. 474, 477 (BIA 2002).

Acquiescence requires that a public official have prior awareness of the activity and "thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7). The Tenth Circuit applies the "willful blindness" standard by which government officials acquiesce to torture when they have actual knowledge of or "turn a blind eye to torture." *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1192 (10th Cir. 2005) (citing *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354 (5th Cir. 2002)).

To meet his burden of proof, an applicant for CAT protection must establish that someone in his particular alleged circumstances will more likely than not be tortured in the country designated for removal. *Cruz-Funez v. Gonzalez*, 406 F.3d 1187, 1192 (10th Cir. 2005) (quoting *Matter of G-A-*, 23 I&N Dec. 366, 371-72 (BIA 2002)). In assessing whether the alien has met his burden, all relevant evidence shall be considered including, but not limited to: (A) evidence of past torture inflicted upon the applicant; (B) evidence that the applicant could relocate to a part of the country where he will not likely be tortured; (C) evidence of gross, flagrant, or mass violations of human rights within the proposed country of removal; and (D) other relevant information regarding country conditions in the proposed country of removal. 8 C.F.R. § 1208.16(c)(3).

Eligibility cannot be established by simply stringing together a series of suppositions to show that torture is more likely than not to occur unless the evidence shows that each step in the hypothetical chain of events is more likely than not to happen. *Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 (A.G. 2006); *see Matter of Y-L-*, 23 I&N Dec. 270, 282, n.16 (A.G. 2002) (string of speculative events in a country with violent incidents but a non-complacent government insufficient for CAT showing); *Matter of M-B-A-*, 23 I&N Dec. 474, 477-78 (BIA 2002) ("[R]espondent's case is based on a chain of assumptions and a fear of what might happen, rather than evidence that meets her burden of demonstrating that it is *more likely than not* that she will be subjected to torture.").

In determining whether a petitioner has met this burden, the Immigration Judge should consider "[e]vidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured." 8 C.F.R. § 208.16(c)(3)(ii).

Cases:

Witjaksono v. Holder, 573 F.3d 968 (10th Cir. 2009) (finding that an Indonesian soldiers' assault of respondent "appears isolated and not demonstrative of official behavior").

Ferry v. Gonzales, 457 F.3d 1117 (10th Cir. 2006) (finding no government acquiescence when authorities provided the applicant information regarding his inclusion on a "death list" and financial assistance to reinforce his home's security).

Medina-Velasquez v. Sessions, 680 Fed. App'x 744 (10th Cir. 2017) (unpublished) (evidence of "widespread corruption and government ineffectiveness" was insufficient to establish willful blindness to torture in Honduras because "a government's inability to provide complete protection does not demonstrate government acquiescence").

Guru v. Lynch, 637 Fed. App'x 501 (10th Cir. 2016) (unpublished) (holding evidence of alleged persecutor's political ties to police was insufficient to demonstrate officials "ratified or knew about the [persecutors'] actions").

Garcia v. Holder, 604 Fed. App'x 709 (10th Cir. 2015) (unpublished) (finding applicant could not establish acquiescence as a result of Mexican police's inadequate investigation because the officers did not have the requisite prior awareness of the activity constituting torture (i.e. the offense investigated)).

Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014) (the Board rejected a claim based on a chain of assumptions in fear of what might happen, rather than evidence that meets the burden of demonstrating that it is more likely than not that the Respondent will be subject to torture).

Matter of J-F-F-, 23 I&N Dec. 912, 920 n. 9 (A.G. 2006) ("A lack of resources is regrettable, but it does not constitute torture under the regulations.").

Matter of J-E-, 23 I&N Dec. 291 (BIA 2002) (finding a lack of access to mental health treatment, including mental health medication, does not constitute torture under the CAT because an act "must be specifically intended to inflict severe physical or mental pain or suffering").

Matter of Y-L-, 23 I&N Dec. 270 (A.G. 2002) ("To suggest that this standard can be met by evidence of isolated rogue agents engaging in extrajudicial acts of brutality, which are not only in contravention of the jurisdiction's laws and policies, but are committed despite authorities' best efforts to root out such misconduct, is to empty the Convention's volitional requirement of all rational meaning.").

Matter of G-A-, 23 I&N Dec. 366 (BIA 2002) (finding country conditions, while relevant, are insufficient, standing alone, to obtain withholding because specific grounds must exist that indicate the individual would be personally at risk).

Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000) (CAT protection does not require a showing that the applicant would be tortured on account of a particular ground).

Sample Language

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(b) (5) [redacted]

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CORROBORATION

Corroborating evidence is not required to demonstrate eligibility for asylum, because asylum may be established through the applicant's own credible, persuasive, and sufficiently detailed testimony. INA § 208(b)(1)(B); 8 C.F.R. § 208.13(a); *Uanreroro v. Gonzales*, 443 F.3d 1197, 1204 (10th Cir. 2006). The applicant's testimony is of the utmost importance because of the difficulty the applicant faces in procuring documentary evidence after having fled his country. *Wiransane v. Ashcroft*, 366 F.3d 889, 897 (10th Cir. 2004).

If the applicant's testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the respondent to submit corroborative evidence *See Matter of Y-B-*, 21 I&N Dec. 1136, 1139 (BIA 1998).

Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence. INA § 208(b)(1)(B). If the evidence is unavailable, the Immigration Judge must afford the applicant an opportunity to explain its unavailability and ensure that the explanation is included in the record. *Matter of S-M-J-*, 22 I&N Dec. 722, 724 (BIA 1997). An IJ is not required to identify the specific corroborating evidence that would be persuasive nor must the judge grant an automatic continuance for the applicant to present corroborating evidence. *Id.*

An IJ's corroboration finding is valid unless a "reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable." 8 U.S.C. § 1252(b)(4).

Cases:

Uanreroro v. Gonzales, 443 F.3d 1197, 1209 (10th Cir. 2006) (holding U.S. Department of States country reports "need not contain detailed information corroborating [the applicant's]

account," rather the inquiry is whether there is "substantial evidence to directly rebut or undermine her claims").

Matter of L-A-C-, 26 I&N Dec. 516, 524 (BIA 2015) ("Section 208(b)(1)(B)(ii) of the Act was intended to codify *Matter of S-M-J-* and not to impose additional rigid requirements for the consideration of corroboration.").

COUNTRY REPORTS

Country condition reports by the State Department are admissible evidence and are considered reliable, persuasive, and probative. *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010).

Cases:

Matter of H-L-H- & Z-Y-Z-, 25 I&N Dec. 209 (BIA 2010) (State Department reports on country conditions are highly probative evidence and are generally the best source of information on conditions in foreign countries), rev'd on other grounds *Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012)(affirming on probative value of State Department reports).

Matter of C-C-, 23 I&N Dec. 899 (BIA 2006) (holding that the State Department documents are more persuasive than expert affidavit).

CREDIBILITY

In all asylum and withholding of removal cases, the Court must first determine whether the testimony of the respondent is credible. INA §§ 208(b)(1)(B)(iii); 241(b)(3)(C); *Matter of O-D-*, 21 I&N Dec. 1079, 1081 (BIA 1998). The asylum applicant's testimony alone, if credible, may be enough to satisfy his or her burden of proof. *See Elzour v. Ashcroft*, 378 F.3d 1143, 1152 n.11 (10th Cir. 2004). Without credible testimony, the respondent cannot meet her burden of proving that she merits the relief of asylum and withholding of removal. *See Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987).

A credibility determination must be made based on the "totality of the circumstances" and "all relevant factors." INA § 208(b)(1)(B)(iii). The following factors may be considered in assessing an applicant's credibility: demeanor, candor, responsiveness, inherent plausibility of the claim, the consistency between oral and written statements, the internal consistency of such statements, the consistency of such statements with evidence of record, and any inaccuracy or falsehood in such statements, regardless of whether it goes to the heart of the applicant's claim. INA § 208(b)(1)(B)(iii); *Matter of J-Y-C-*, 24 I&N Dec. at 262; *Matter of S-B-*, 24 I&N Dec. 42, 43 n.1 (BIA 2006). "[I]t is within the [Immigration Judge's] province to make reasonable conclusions based on facts in the record." *See Chaib v. Ashcroft*, 397 F.3d 1273, 1279 (10th Cir. 2005).

There are certain "inherent problems with credibility determinations in asylum cases," such as: translation and cultural misunderstandings, the asylum applicants' unfamiliarity with American procedures and wariness of lawyers and officials, ineffective assistance of counsel, acts of deceit and prevarication, bribery or forgery to escape persecution, and difficulty in obtaining documents from country of persecution due to troubled relations. *Solomon v. Gonzales*, 454 F.3d 1160, 1163-64 (10th Cir. 2006).

The Immigration Judge's decision must be "supported by reasonable, substantial and probative evidence on the record as a whole." *See Solomon v. Gonzales*, 454 F.3d 1160, 1163-64 (10th Cir. 2006), *quoting Krastev v. INS*, 292 F.3d 1268, 1275 (10th Cir. 2002).

As the Immigration Judge is "in the best position to evaluate an alien's testimony, his or her credibility determinations are to be given 'much weight'." *See Dulane v. INS*, 46 F.3d 988, 998 (10th Cir. 1995), *quoting Estrada v. INS*, 775 F.2d 1018, 1021 (9th Cir. 1985).

ADVERSE CREDIBILITY

An adverse credibility finding must be supported by "specific and cogent" reasons that have a legitimate nexus to the finding in the case. *Matter of A-S-*, 21 I&N Dec. 1106, 1110 (BIA 1998). Testimony is not credible if it is inconsistent, inherently improbable, or contradicts current country conditions. *Matter of S-M-J-*, 21 I&N Dec. 722, 729 (BIA 1997). While minor and isolated discrepancies in the applicant's testimony are not necessarily fatal to credibility, the omission of key events coupled with numerous inconsistencies may lead to a finding that the applicant is not credible. *Matter of A-S-*, 21 I&N Dec. at 1109-10. An adverse credibility finding may also be based on testimonial demeanor or a lack of sufficiently detailed testimony. *See Chaib v. Ashcroft*, 397 F.3d 1273, 1278 (10th Cir. 2005), *citing Elzour v. Ashcroft*, 378 F.3d 143, 1152-53 (10th Cir. 2004).

Speculation, conjecture or unsupported personal opinion does not support an adverse credibility finding. *See Uanreroro v. Gonzales*, 443 F.3d 1197, 1205 (10th Cir. 2006); *see also Niang v. Gonzales*, 422 F.3d 1187, 1201 (10th Cir. 2005).

Cases:

Htun v. Lynch, 818 F.3d 1111 (10th Cir. 2016) (Burmese applicant seeking asylum lacked credibility because he testified that his political activities resulted in his father being arrested, but in his asylum application alien claimed his father was arrested because he was a jewelry broker, not because of alien's political activities).

Ismaiel v. Mukasey, 516 F.3d 1198 (10th Cir. 2008) (failure to mention torture on an asylum application and on supplemental letters submitted two weeks before hearing could form basis for adverse credibility determination in denying withholding of removal, particularly where application explicitly asked for such information and alien had assistance of counsel).

Kabba v. Mukasey, 530 F.3d 1239 (10th Cir. 2008) (before an Immigration Judge may base an adverse credibility finding of an alien's submission of a fraudulent document, there must be a finding that the alien knew the document was forged, and further holding that the applicant's asylum application and testimony were not inconsistent, finding that the differences were largely an issue of the amount of detail provided).

Sarr v. Gonzales, 474 F.3d 783 (10th Cir. 2007) (an alien's statement that his birth certificate had been preserved by his mother did not directly contradict and was not inconsistent with his earlier testimony that all of his family documents were destroyed).

Solomon v. Gonzales, 454 F.3d 1160 (10th Cir. 2006) ("Deception to obtain documents necessary to escape persecution abroad is not substantial evidence of an intent to deceive an American court.").

Diallo v. Gonzales, 447 F.3d 1274 (10th Cir. 2006) (finding inconsistencies between the asylum applicant's 1996 and 2004 asylum hearings regarding his reunion with family members upon his arrival at a refugee camp, how many teeth he lost after getting hit with a fist, and his arrest were material).

Uanreroro v. Gonzales, 443 F.3d 1197 (10th Cir. 2006) (the Tenth Circuit did not adopt the Ninth Circuit's rule that lies told to gain admission cannot serve as a basis for an adverse credibility determination, but rather the court holds that a false statement to an immigration inspector upon entry is a relevant factor to consider and holding that an applicant's testimony is not plausible "must be supported by substantial evidence in the record").

Yan v. Gonzales, 438 F.3d 1249 (10th Cir. 2006) (holding "a detailed knowledge of [religious] doctrine may be irrelevant to the sincerity of an [asylum] applicant's belief; a recent convert may well lack detailed knowledge of religious custom" and minor inconsistencies in knowledge were insufficient to find alien not credible).

Chaib v. Ashcroft, 397 F.3d 1273 (10th Cir. 2005) (finding that the IJ questioned the reasonableness of the alien's fear of returning to Algeria, rather than disbelieving the underlying facts that supported that fear).

Elzour v. Ashcroft, 378 F.3d 1143, 1153-54 (10th Cir. 2004) (an adverse credibility finding may be based on factors such as implausibility). The court held that the Immigration Judge's finding that it was implausible that Syria would detain the alien for a prolonged period of time, that Syria would not arrest and detain a "military man" in the manner described by the alien, that any interest that Syria might have had in the alien would have subsided, and that Syria would not have compensated the alien after his first release from prison was not "based on any evidence in the record, but rather on the [Immigration Judge's] own expectations as to how the Syrian government operated."

Elboukili v. INS, 125 F.3d 861 (10th Cir. 1997) (upholding the Board's adverse credibility finding where the asylum applicant failed to offer explanations for inconsistencies in the record to the Board).

Singh v. Sessions, 712 Fed. App'x 819 (10th Cir. 2018) (affirming BIA's determination that an applicant was not credible, in part because he added a claim that he was persecuted by Hindu BJP party because he was engaged to a Hindu woman and the party disapproved of Sikh-Hindu marriages).

Rodas v. Lynch, 658 Fed. App'x 918 (10th Cir. 2016) (affirming an adverse credibility determination, because the applicant's testimony was inconsistent with other documentary evidence regarding when he was physically assaulted in Honduras, how many persons assaulted him, and whether he sought medical attention for his injuries).

Jing Li v. Holder, 607 Fed. App'x 818 (10th Cir. 2015) (adverse credibility finding also upheld where the respondent's testimony at an individual hearing was inconsistent with the information provided in his application and to an asylum officer).

Na Zheng v. Holder, 507 Fed. App'x 755 (10th Cir. 2013) (concluding that an adverse credibility finding based on the applicant's uncertainty and vagueness in her testimony was not adequately founded on cogent and substantially reasonable bases).

Xunsheng Li v. Mukasey, 302 Fed. App'x 839 (10th Cir. 2008) (finding that the Immigration Judge gave specific and cogent reasons for disbelieving the respondent's testimony that he did not know about the sterilization procedures because his wife withheld the information to protect him from worrying).

Panjaita n v. Gonzales, 172 Fed. App'x. 870 (10th Cir. 2006) (omission from the written asylum application of three significant acts of violence at the hands of Muslims justified Immigration Judge's adverse credibility finding).

Dia v. Gonzales, 150 Fed. App'x. 883 (10th Cir. 2005) (the court upheld an Immigration Judge's adverse credibility finding where "the record supports the [Immigration Judge's] conclusion that [asylum applicant] made inconsistent statements over time to bolster his arguments for asylum").

Suarez-Romero v. Gonzales, 154 Fed. App'x. 58 (10th Cir. 2005) (upholding an adverse credibility finding based on a respondent's failure to mention events central to his asylum claim (i.e., that men followed him or threats to his family) in his asylum application or during his asylum interview).

Matter of O-D-, 21 I&N Dec. 1079 (BIA 1998) (the Board established that when a respondent claims to be a citizen and national of a certain country "a concomitant to such claim is the burden of establishing identity, nationality, and citizenship," and therefore it is the alien's burden to establish his identity as a citizen and national of the country from which he seeks refuge).

DISCRETION

"Judicial discretion" is defined as "the exercise of judgment guided by the rules and principles of law, based on the facts, for what is fair under the circumstances and; a court's power to act or not act when a respondent is not entitled to demand the act as a matter of right." Black's Law Dictionary (9th ed. 2009). It is important to note that the Attorney General is not required to grant asylum to everyone who meets the definition of refugee. Instead, a finding that an alien is a refugee does no more than establish that "the alien may be granted asylum *in the discretion of the Attorney General*." INA § 208(2)(b)(1); 8 U.S.C. § 1158(b) (emphasis added); *see INS v. Stevic*, 467 U. S. 407, 423, n. 18 (1984); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 441-444 (1987). The Supreme Court has clarified that asylum is a discretionary mechanism that corresponds with Article 34 of the United Nations Convention Relating to the State of Refugees, a "precatory" provision. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 441 (1987).

The Immigration Judge is precluded from exercising discretion in a withholding claim or a claim under the Convention Against Torture. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987).

The applicant bears the burden of establishing she merits a favorable exercise of discretion. 8 U.S.C. §§ 1158(b)(1), 1229a(c)(4)(A)(ii).

Cases:

Matter of A-B-, 27 I&N Dec. 316, 345 n.12 (A.G. 2018) (noting "discretion is a discrete requirement," therefore an Immigration Judge is expected to make a finding regarding discretion and a favorable exercise of discretion "should not be presumed or glossed over solely because an applicant otherwise meets the burden of proof for asylum eligibility.").

Matter of H-, 21 I&N Dec. 337 (BIA 1996) (holding careful attention should be given to compelling, humanitarian considerations that would be involved if the refugee were to be forced to return to a country where he or she was persecuted in the past).

Matter of Pula, 19 I&N Dec. 467 (BIA 1987) (holding circumvention of immigration laws should not be the only consideration for asylum, rather other factors such as, whether the alien passed through other countries before arrival; whether immigration laws in other countries provided the alien relief; evidence of other attempts to seek asylum before entering the United States; time the alien remained in a third country in addition to the living conditions, safety, and potential for long-term residency in that country; ties to the United States; and "the circumstances and actions of the alien in his flight from the country where he fears persecution, general humanitarian considerations").

Sample Language

(b) (5)
[redacted]

[redacted]

DUAL NATIONALITY

An alien who is a citizen of more than one country, but has no fear of persecution in one of those countries, does not qualify as a "refugee" under section 101(a)(42) of the INA and is ineligible for asylum. *Matter of B-R-*, 26 I&N Dec. 119 (BIA 2013) ("Once nationality is established, it is the alien's burden to demonstrate that the alternative country of nationality will not offer him protection."). This inquiry is distinct from the "safe third country" and "firm resettlement" exceptions. *Id*. at 121.

Cases:

(b) (6) [redacted] at 24 (BIA June 26, 1990) (holding a passport issued to respondent designating her a national of a second country was not sufficient to establish nationality in that country because a country of nationality is defined as "home" or a place of usual residence where a person "owes permanent allegiance to").

Sample Language

(b) (5) [redacted]

ECONOMIC PERSECUTION

Persecution "could consist of economic deprivation or restrictions so severe that they constitute a threat to an individual's life or freedom," or may be the "deliberate imposition of substantial economic disadvantage." *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *overruled on other grounds by INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Matter of T-Z-,* 24 I&N Dec. 163 (BIA 2007).

"The economic difficulties must be above and beyond those generally shared by others in the country of origin and involve noticeably more than mere loss of social advantages or physical comforts." *Matter of T-Z-*, 24 I&N Dec. 163, 173 (BIA 2007) (citing *Cheng Kai Fu v. INS*, 386 F.2d 750, 753 (2d Cir. 1967)). "[T]he deprivation of liberty, food, housing, employment or other essentials of life" may amount to persecution. *Id*. at 222. "A particularly onerous fine, a large-scale confiscation of property, or a sweeping limitation of opportunities to continue to work in an established profession or business may amount to persecution even though the applicant could otherwise survive." *Id.* at 174. However, deprivation need not be total. *Id*. at 173.

The Immigration Judge should consider the hardship as compared to respondent's overall financial health, availability of other sources of income, loss of social/government benefits, confiscation of business property.

Cases:

Zhi Wei Pang v. Holder, 665 F.3d 1226 (10th Cir. 2012) (the imposition of a fine and loss of entertainment equipment for violation of Chinese one-child policy did not amount to persecution).

Vicente-Elias v. Mukasey, 532 F.3d 1086 (10th Cir. 2008) (the Tenth Circuit approved of dual standard for economic persecution in Matter of T-Z- and found "potential job loss, generalized economic disadvantage, and social discrimination" without more did not amount to persecution).

Baka v. INS, 963 F.2d 1376 (10th Cir. 1992) (holding evidence that applicants were not eligible for promotions and held less advantageous jobs than members of the persecutor's political party did not amount to persecution).

Valero-Avendano v. Holder, 418 Fed. App'x. 720 (10th Cir. 2011) (the record did not establish a pattern or practice of economic persecution in Venezuela against anti-Chavez proponents).

Sample Language

(b) (5) [redacted]

EVIDENCE

An applicant has the right to present evidence. INA § 240(b)(4)(B); 8 U.S.C. § 1229a(b)(4)(B); *Barrera-Quintero v. Holder*, 699 F.3d 1239, 1248 (10th Cir. 2012) (an alien in removal proceedings "shall have a reasonable opportunity to examine the evidence against [him], to present evidence on [his] own behalf, and to cross-examine witnesses presented by the Government").

Federal Rules of Evidence are not binding in immigration proceedings, although they may be instructive, and that evidentiary considerations are more relaxed in Immigration Court than in Federal court. *See Matter of De Vera*, 16 I&N Dec. 266, 268-69 (BIA 1977). Removal proceedings are civil in nature, and the extensive constitutional safeguards attending criminal proceedings do not apply. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *United States v. Aguirre-Tello*, 353 F.3d 1199, 1204 (10th Cir.2004).

"The tests for the admissibility of documentary evidence in deportation proceedings are that evidence must be probative and that its use must be fundamentally fair." *See Matter of D-R-*, 25 I&N Dec. 445, 458 (BIA 2011); *see also Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988). An immigration judge has "broad discretion to accept a document as authentic or not based on the particular factual showing." *See Matter of D-R-*, 25 I&N Dec. at 458.

Experts:
"An expert is permitted to base his opinion on hearsay evidence and need not have personal knowledge of the facts underlying his opinion." *Matter of D-R-*, 25 I&N Dec. 445, 460 (BIA 2011) (citing *Aguilar-Ramos v. Holder*, 594 F.3d 701, 706 n.7 (9th Cir. 2010)). "An expert opinion may include reasonable inferences that the expert draws from the available facts and data." *Id*. (citing Fed. R. Evid. 703).

Witnesses generally may not opine on questions of law. *See Matter of Cruzado*, 14 I&N Dec. 513, 515 (BIA 1973) (holding that the opinions of a professor and others as to the proper construction of a State statute is not admissible). An exception to this rule is when an expert provides an opinion on foreign law or procedure. *See Matter of Rowe*, 23 I&N Dec. 962 (BIA 2006); *Matter of Kodwo*, 24 I&N Dec. 479 (BIA 2008); *Matter of Khatoon*, 19 I&N Dec. 153 (BIA 1984); *Matter of Yue*, 12 I&N Dec. 747 (BIA 1968).

Cases:

Barrera-Quintero v. Holder, 699 F.3d 1239 (10th Cir. 2012) (the fact that an immigration officer testified by telephone, rather than in person, at an alien's removal hearing did not offend alien's right to procedural due process, despite an applicant's contention that visual evaluation of officer was essential to assessing credibility of his testimony, where officer's absence from hearing was legitimate and not contrived, officer was under oath, and alien's counsel examined him at length).

Schroeck v. Gonzales, 429 F.3d 947 (10th Cir. 2005) (holding that when facing removal, aliens are entitled only to procedural due process, which provides "the opportunity to be heard at 'a meaningful time and in a meaningful manner.'").

Zhen Rong Lin v. Gonzales, 230 Fed. App'x 795 (10th Cir. 2007) (admission in proceedings on application for asylum of form prepared at time of applicant's initial processing did not deprive applicant of due process of law, where information on such form was probative, in that it referenced applicant's alleged role as crew member and enforcer of alien smuggling vessel and undercut his story that he himself was escaping from China, and admission of form was not fundamentally unfair, in that applicant was given opportunity to explain his activities aboard vessel but was evasive and unresponsive).

Matter of D-R-, 25 I&N Dec. 445 (BIA 2011) (an IJ has broad discretion to determine what evidence to admit into the record and what weight this evidence will be given).

Matter of C-C-, 23 I&N Dec. 899 (BIA 2006) (holding that the State Department documents are more persuasive than expert affidavit).

Matter of Pineda, 20 I&N Dec. 70 (BIA 1989) (documentary evidence that was created contemporaneously with the events in question is more persuasive than a document that is obtained to provide evidence for an immigration hearing).

Matter of E-M-, 20 I&N Dec. 77 (BIA 1989) (finding that in ascertaining the evidentiary weight of affidavits, the Court must determine the basis for the affiant's knowledge of the information to which she is attesting and whether the statement is plausible, credible, and consistent both internally and with other evidence of record).

Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980) (recognizing that the statements of counsel are not evidence).

EXTORTION

Extortion alone is generally insufficient to demonstrate persecution. *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74 (BIA 2007).

Cases:

Charalambos v. Holder, 326 Fed. App'x 478 (10th Cir. 2009) (fear of persecution based on the belief that respondent funded a rival terrorist organization not enough to meet eligibility requirements).

Matter of N-C-M-, 25 I&N Dec. 535, 536 n.1 (BIA 2011) (evidence the alien and his family members were extorted, threatened, beaten, and robbed by gang members did not establish a nexus to a protected ground under the Act).

Matter of T-M-B-, 21 I&N Dec. 775 (BIA 1997) (criminal extortion is not recognized by BIA as persecution on account of political opinion).

Matter of V-T-S-, 21 I&N Dec. 792 (BIA 1997) (Respondent was native and citizen of the Philippines being sought after by members of a Muslim group trying to extract "revolutionary or corporate taxes" from Respondent and his family).

(b) (6) (BIA Feb. 2, 2015) (extortion for perceived or actual wealth based on repatriation from the United States is not persecution).

FALSE TESTIMONY

False statements need not be uttered in administrative or judicial proceedings, but can include statements made under oath to government officials, including Service officers and consular officials. *Matter of Namio*, 14 I&N Dec. 412, 414 (BIA 1973) (false statement under oath to a border patrol agent); *Matter of Ngan*, 10 I&N Dec.725 (BIA 1964) ("false testimony" to a Service officer in connection with processing a visa petition); *Matter of G-L-T-*, 8 I&N Dec. 403 (BIA 1959) ("false testimony" to a Service officer in connection with an application Nicaraguan and Central American Relief Act), 9 I&N Dec. 118 (BIA 1960) ("false testimony" to an Immigration officer at an airport with voluntary and timely retraction).

Cases:

Kivumbi v. Ashcroft, 109 Fed. App'x 378 (10th Cir. 2004) (holding that it was reasonable for an IJ to rely on a Respondent's testimony, asylum application, and an asylum officer's assessment to support a finding that Respondent had been providing false testimony.

FAMILY (PSG)

The Board has cited "kinship ties" as an "innate characteristic," which may form the basis of a cognizable particular social group. *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985). Whether an applicant qualifies for asylum based on family membership depends on the nature and degree of the relationships involved and how those relationships are regarded by the society in question. *Matter of L-E-A-*, 27 I&N Dec. 40, 42 (BIA 2017) ("members of an immediate family may constitute a particular social group"). An applicant must not only demonstrate that he or she is a member of a qualifying family unit but also that the family relationship is at least one central reason for the claimed harm. *Id*.

The Attorney General in *Matter of A-B-* suggested that *Matter of L-E-A-* was incorrectly decided because the Board issued a precedential opinion in a case where the Department made concessions regarding the respondent's asylum eligibility, which bypassed the "rigorous legal analysis required by the Board precedent." 27 I&N Dec. 316, 333 n.8 (A.G. 2018) ("There is reasons to doubt that a nuclear family can comprise a particular social group under the statute.").

OTHER FAMILY MEMBERSHIP TOPICS

The Tenth Circuit does not have published a decision on point. However, many Immigration Judges within the Tenth Circuit have applied *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015) (finding a nexus between a familial relationship and gang threats because the respondent's "relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join [the gang]"). The Fourth Circuit held the applicant's "relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join Mara 18." *Id*. at 950. *Cantillano Cruz v. Sessions,* 853 F.3d 122 (4th Cir. 2017) (stating that "a 'nuclear family' is 'a family group consisting of a father, mother, and children'").

Family members of murder victims

For purposes of establishing eligibility for asylum under section 208 of the Act, 8 U.S.C.§ 1158, the respondents have not established that they were previously persecuted in Honduras on account of their membership in the proposed particular social group, "close family members of victims of murder and attempted murder in Honduras." *See* 8 C.F.R. § 1208.13(b)(l); *Matter of J-B-N- & S-M-,* 24 I&N Dec. 208 (BIA 2007).

Pressure on family members to disclose information

Threats to coerce disclosure of information appear to be only criminal acts motivated by personal reasons, and do not constitute persecution for asylum purposes. *See Matter of Mogharrabi*, 19 I&N Dec. 439, 447 (BIA 1987) (aliens fearing harm over purely personal matters would not qualify for asylum); *see also Matter of J-B-N- & S-M-*, at 214 (to be considered persecution for asylum purposes, harm must be motivated by a protected ground, and not merely incidental, tangential, or subordinate to another reason for inflicting the harm).

Cases:

Rivera-Barrientos v. Holder, 666 F.3d 641 (10th Cir. 2012) (stating that social visibility requires that "the applicant's community is capable of identifying an individual as belonging to the group" and listing family as an example of a group defined by traits that are "highly visible and recognizable").

Niang v. Gonzales, 422 F.3d 1187 (10th Cir. 2005) (tribal membership is an immutable characteristic).

Matter of L-E-A, 27 I&N Dec. 40 (BIA 2017) ("It is clear that nexus would be established based on family membership where a persecutor is seeking to harm the family members because of an animus against the family itself."). In other words, the motivation for the persecution must be kinship. If the motivation behind the persecution or harm is revenge or intimidation, then the persecution is not based upon family membership.

Matter of N-M-, 25 I&N Dec. 526 (BIA 2011) (holding that if the persecutor would have treated the applicant the same if the protected characteristic of the family did not exist, then the applicant has not established a claim on this ground.).

Matter of C-T-L-, 25 I&N Dec. 341 (BIA 2010) (finding that threats that received of a personal or retaliatory nature and not because of any politically held or imputed opinion or because of his membership in any particular social group").

Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008) (holding that the family members of Salvadoran youth that oppose gangs does not constitute a "particular social group.").

Matter of A-K-, 24 I&N Dec. 275 (BIA 2007) (holding the applicant may not attribute acts against his family members to himself, absent a pattern of persecution that is tied to him personally).

Matter of J-B-N- & S-M-, 24 I&N Dec. 208 (BIA 2007) (holding that the record reflects no direct or circumstantial evidence that would tend to show that the respondents' aunt and cousins were interested in harming them because they came from Burundi).

Matter of C-A-, 23 I&N Dec. 951 (BIA 2006) ("Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups.").

Matter of H-, 21 I&N Dec. 337 (BIA 1996) (accepting "clan membership" as a particular social group because it was "inextricably linked to family ties").

Matter of Villalta, 20 I&N Dec. 142 (BIA 1990) (evidence concerning treatment of the applicant's family or similarly situated friends may be probative of a threat against the applicant).

Matter of Acosta, 19 I&N Dec. 211 (BIA 1985) (stating that "kinship ties" is a common, immutable characteristic).

Sample Language

(b) (5)

(b) (5)

(b) (5)

(b) (5) [redacted]

FEMALES (PSG)

If the respondent claims membership in a particular social group defined as "females" or "males" the group will possibly fail the particularity prong required for a particular social group. Such group does not satisfy the "particularity" requirement for defining a particular social group. The respondent's proposed group could include persons of a wide range of ages and backgrounds, such that it lacks sufficient particularity. *See Niang v. Gonzales*, 422 F.3d 1187, 1199-200 (10th Cir. 2005).

"There may be understandable concern in using gender as a group-defining characteristic. **One may be reluctant to permit, for example, half a nation's residents to obtain asylum on the ground that women are persecuted there. [internal citations omitted] But the focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted "on account of" their membership.** 8 U.S.C. § 1101(a)42(A). It may well be that only certain women—say, those who protest inequities—suffer harm severe enough to be considered persecution. The issue then becomes whether the protesting women constitute a social group." *Niang v. Gonzales*, 422 F.3d 1187, 1199-200 (10th Cir. 2005).

Cases:

Niang v. Gonzales, 422 F.3d 1187 (10th Cir. 2005) (stating that either gender can constitute a particular social group by meeting the immutability prong). Note that PSG in this case was gender and tribal membership.

Maatougui v. Holder, 738 F.3d 1230 (10th Cir. 2013) (holding gender alone is not a sufficiently distinct "social group" on which to base a "refugee" finding).

Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014) (proposed group including include men, women, and children of all ages failed on particularity and social visibility).

Matter of Kasinga, 21 I&N Dec. 357, 376 (BIA 1996) (stating that "consideration of gender-based . . . asylum claims within the "membership in a particular social group" construct that exists within the Act is entirely appropriate and consistent with the developing trend of jurisprudence in the United States").

Matter of Acosta, 19 I&N Dec. 211, 233 (BIA 1985) (a shared characteristic might be an innate one such as sex, color, or kinship ties).

FIRM RESETTLEMENT BAR – ASYLUM ONLY

An alien is ineligible for *asylum* if she has firmly resettled in another country prior to entering the US. The BIA set forth a four-step analysis to determine if the bar applies:

> (1) The Department bears the burden of presenting direct evidence of an offer of firm resettlement;
> (2) The applicant may then rebut this evidence by showing by a preponderance of the evidence that such an offer has not, in fact, been made or that the applicant's circumstances would render him ineligible for such an offer of permanent residence;
> (3) The court then considers the totality of the evidence presented by the parties to determine whether the applicant has rebutted the Department's evidence of an offer; and
> (4) If the applicant has failed to rebut the Department's evidence, the applicant bears the burden to establish by a preponderance of the evidence that an exception to firm resettlement applies.

Matter of A-G-G-, 25 I&N Dec. 486, 501-03 (BIA 2011).

Note: Two approaches are used by Circuit courts when determining what evidence will establish *prima facie* evidence of firm resettlement: (1) Direct Offer Approach and (2) Totality of the Circumstances Approach. The Tenth Circuit does not explicitly invoke one or the other, but there is persuasive authority that the Tenth Circuit would follow the direct offer approach. *See Elzour v. Ashcroft*, 378 F.3d 1143, 1151 (10th Cir. 2004) (holding that an offer of permanent resettlement may be proven by either direct or circumstantial evidence).

Exceptions under 8 C.F.R. § 1208.15(a) "that his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country" OR 8 C.F.R. § 1208.15(b) "that the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled."

Cases:

Matter of D-X- & Y-Z-, 25 I&N Dec. 664 (BIA 2012) (finding a facially valid permit to reside in a third country constitutes prima facie evidence of an offer of firm resettlement pursuant to section 208(b)(2)(A)(vi) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(2)(A)(vi) (2006), even if the permit was fraudulently obtained).

Matter of A-G-G-, 25 I&N Dec. 486 (BIA 2011) (establishing a four-step framework for determining whether an alien is firmly resettled).

Matter of Soleimani, 20 I&N Dec. 99 (BIA 1989) (the question of resettlement is not always limited solely to the inquiry of how much time has elapsed between the alien's flight and the asylum application; other factors germane to the question of whether the alien has firmly resettled include family ties, intent, business or property connections, and other matters).

Sample Language

(b) (5)
[redacted]

[redacted]

[redacted]

FORMER MILITARY AND POLICE (PSG)

An applicant's status as a military personnel or police officer may serve as a basis for a particular social group. *See Estrada-Escobar v. Ashcroft*, 376 F.3d 1042, 1047 (10th Cir. 2004) (stating that both the BIA, in *Matter of Fuentes*, 19 I&N Dec. at 662, and the Ninth Circuit, in *Cruz-Navarro v. INS*, 232 F.3d 1024, 1029 (2000), have acknowledged that "[p]ersons who are persecuted because of their status as a former police or military officer . . . may constitute a cognizable social group under the INA"). Former service "is in fact an immutable characteristic, as it is one beyond the capacity of the respondent to change," and may serve as the basis for an asylum claim. *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988) (noting "the most fundamental question of whether or not such individuals are in fact no longer taking part in the hostilities either overtly or covertly").

Applicants who face "attacks and dangers" by virtue of being an officer likely do not qualify for asylum. "[T]he dangers the police face are no more related to their personal characteristics or political beliefs than are the dangers faced by military combatants[,]" and therefore "[s]uch perils arise from the nature of their employment and domestic unrest rather than 'on account of' immutable characteristics or beliefs." *Matter of Fuentes*, 19 I&N Dec. 658, 661 (BIA 1988).

"Were a situation to develop in which former police officers were targeted for persecution because of the fact of having served as police officers, a former police officer could conceivably demonstrate persecution based upon membership in a particular social group of former police officers. On the other hand, if a former police officer were singled out for reprisal, not because of his status as a former police officer, but because of his role in disrupting particular criminal activity, he would not be considered, without more, to have been targeted as a member of a particular social group." *See Matter of C-A-*, 23 I&N Dec. 951, 958-59 (BIA 2006).

Cases:

Estrada-Escobar v. Ashcroft, 376 F.3d 1042 (10th Cir. 2004) (finding respondent failed to carry his burden in demonstrating that Shining Path targeted him on account of his former police

service when evidence demonstrated political officials and high-profile activists were targeted for harm).

Matter of C-A-, 23 I&N Dec. 951 (BIA 2006) (stating "if a former police officer were singled out for reprisal, not because of his status as a former police officer, but because of his role in disrupting particular criminal activity, he would not be considered . . . to have been targeted as a member of a particular social group").

Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988) (acknowledging that claims of future persecution could arise from an applicant's status as a former police officer).

(b) (6) (BIA Aug. 10, 2006) (finding applicant's role in trying to stop criminal behavior by corrupt police did not establish a clear probability of persecution on account of the proposed protected ground, "social group of ex-Sandinista policemen who have witnessed Sandinista complicity in drug trafficking").

(b) (6) (BIA Sep. 28, 2006) (finding retaliation for applicant's role in a drug arrest was not on account of a protected ground, rather for disrupting criminal activity).

FRIVOLOUS ASYLUM APPLICATIONS

A finding that an alien filed a frivolous asylum application shall preclude the alien from seeking asylum, but not withholding of removal. 8 C.F.R. § 1208.20; *see also* INA § 208(d)(6). An asylum application is frivolous if any material elements are deliberately fabricated. Such finding shall only be made if the IJ or Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim. 8 C.F.R. § 1208.20.

It is the burden of DHS to show by a preponderance of the evidence that an application for asylum is frivolous. *Matter of Y-L-*, 24 I&N Dec. 151, 157-58 (BIA 2007). The IJ should not rely solely on the adverse credibility finding to support the frivolous claim finding, but only the dramatically different factual premises in the asylum applications and the respondent's inability to persuasively explain why these applications were so incongruent.

Cases:

Ribas v. Mukasey, 545 F.3d 922 (10th Cir. 2008) (alien received adequate notice on the asylum application form he filed that his knowing filing of a frivolous asylum application would result in permanent ineligibility for benefits under the Immigration and Nationality Act).

Jie Liu v. Holder, 586 Fed. App'x 455 (10th Cir. 2014) (holding that substantial evidence supported finding that alien had received notice of consequences of filing frivolous asylum application at time that application was signed, such that her admittedly untrue and exaggerated factual statements in application rendered her ineligible for status adjustment or any immigration relief).

Matter of B-Y-, 25 I&N Dec. 236 (BIA 2010) ("Sufficient notice is afforded when the Immigration Judge explains the consequences of filing a frivolous asylum application, either at the time the asylum application is filed or prior to the commence of the merits hearing.").

Matter of X-M-C-, 25 I&N Dec. 322 (BIA 2010) (the filing of an asylum application is enough to trigger a frivolous inquiry as there is no need to wait until the Court determines the merits of the application).

Matter of Y-L-, 24 I&N Dec. 151 (BIA 2007) (holding that in making a frivolousness determination, an Immigration Judge may incorporate by reference any factual findings made in support of an adverse credibility finding, so long as the Immigration Judge makes explicit findings that the incredible aspects of the asylum application were material and were deliberately fabricated (as a statement that misrepresents the truth)).

GANG RELATED CLAIMS

Asylum claims related to gang violence usually do not pass muster for failure to propose a cognizable particular social group and nexus. *Rivera-Barrientos v. Holder,* 666 F.3d 641 (10th Cir. 2012); *Matter of A-B-*, 27 I&N Dec. 316, 335 (A.G. 2018) ("Victims of gang violence often come from all segments of society, and they possess no distinguishing characteristic or concrete trait that would readily identify them as members of such a group.").

The Tenth Circuit has had limited review of whether gang-related claims merit a grant of asylum. In *Rivera-Barrientos,* the court ruled that "Salvadoran women between the ages of 12 and 25 who resisted gang recruitment" was sufficiently particular to constitute a particular social group, but the court concluded there was insufficient evidence to show that Salvadoran society considered young women who have resisted gang recruitment to be a "distinct social group." 666 F.3d at 653. In *Rodas-Orellana,* the Tenth Circuit held El Salvadorans who had been threatened and actively recruited by gangs, who resisted joining because they opposed gangs, did not constitute a particular social group because it was not sufficiently distinct. 780 F.3d 982, 993 (10th Cir. 2015).

Generally, the Board has held that imputed gang membership is not a valid basis for a particular social group. *See Matter of E-A-G-*, 24 I&N Dec. 591, 595 (BIA 2008). However, the Tenth Circuit in an unpublished decision disagreed with the Board's reasoning in *Matter of E-A-G-*. *See Escamilla v. Holder*, 549 Fed. App'x. 776, 786 (10th Cir. 2012) (noting that policy concerns regarding the protection of individuals who are members of violent street gangs, are not present for aliens who have never been a part of a gang yet are perceived as gang members).

Gang-related claims often arise in the context of political opinion or, more commonly, particular social group grounds. Common political opinion claims include political opponents of gangs and resisting recruitment as a form of political expression. These claims are likely to fail based on evidence that the applicant's political opinion was not one central reason for the persecution. *Rivera-Barrientos,* 666 F.3d at 646.

Possible social group claims that may come before the court based on prior case law, include:

(1) Individuals who resist gang recruitment. Likely to fail for lack of social distinction.

(2) People who are perceived to be members of a gang. Likely to fail for lack of social distinction.
(3) People who are former gang members. Very likely to fail on public policy grounds.
(4) People extorted by gangs because of their perceived wealth.
(5) Individuals who retaliate against a gang. Likely to fail for lack of social distinction.
(6) Single, marginalized, females who fear gangs. Likely to fail on social distinction and particularity.
(7) Individuals who fear gang recruitment and persecution. Very likely to fail because argument relies on circular reasoning.
(8) Member of a family targeted by gangs.

Cases:

Rodas-Orellana v. Holder, 780 F.3d 982 (10th Cir. 2015) (approving of the social distinction analysis in *Matter of S-E-G-* and *Rivera-Barrientos* in holding that individuals who resist gang recruitment are socially distinct within El Salvadoran society).

Rivera-Barrientos v. Holder, 666 F.3d 641 (10th Cir. 2012) (finding the BIA did not err in finding that the applicant's political opinion (her vocal opposition to the gangs) played only a minor role in her past mistreatment).

Torres-Rivera v. Sessions, 706 Fed. App'x 482 (10th Cir. 2017) (holding respondent failed to provide reasonably available corroborating evidence related to his claim of past persecution by gangs based on his membership in the group, "small business owners of the Torres family originating from Sonsonate, El Salvador").

Medina-Velasquez v. Sessions, 680 Fed. App'x 744 (10th Cir. 2017) (holding that an applicant's proposed social group of "Hondurans who are coerced into gang membership while in college and who then escape to the United States, thereby becoming former gang members" was not socially distinct and the gang was inclined to commit violence against any person who opposed their interests, not specifically the proposed group).

Cayetano-Castillo v. Lynch, 630 Fed. App'x 788 (10th Cir. 2015) (finding that gang members had not persecuted the applicant because of his proposed membership because he testified that he was initially attacked in an attempt by gang members to rob him and rape his mother, and that he was subsequently assaulted for stabbing gang member in neck during initial attack). The proposed group also failed for lack of social distinction.

Garcia v. Holder, 604 Fed. App'x 709 (10th Cir. 2015) (finding that an applicant did not offer any evidence that Mexican society considered his proposed group, resisters of gang recruitment in Mexico, as socially distinct and that he was precluded from establishing eligibility for relief). The applicant argued primarily that because gang violence in Mexico was ongoing and widespread, society was "more likely to perceive resisters as a distinct social group.

Beltran-Valles v. Holder, 592 Fed. App'x 726 (10th Cir. 2014) (BIA's decision denying motion to reopen affirmed where alien failed to make prima facie showing of eligibility for asylum

based on membership in group merely by presenting evidence of threats to other relatives living in Mexico, which were not tied to his brother's resistance of cartel's recruitment efforts, or by introducing United Nations report on conditions in Mexico, which indicated that relatives of those who have resisted gang activity "m[ight] be targeted" by gangs.).

Fuentes-Chavarria v. Holder, 562 Fed. App'x 625 (10th Cir. 2014) (Honduran applicant's proposed group of economically marginalized, socially vulnerable young women living in homes without male presence did not have requisite social visibility, or was not defined with sufficient particularity, to qualify as a particular social group). The applicant presented evidence that the Honduran government failed to protect women from gang violence, but she did not show that her alleged perpetrator would likely harm her on behalf of the government or with government's willful blindness for CAT purposes.

Cosenza-Cruz v. Holder, 533 Fed. App'x 847 (10th Cir. 2013) (concluding Immigration Judge found that despite extortion demands and threats of physical violence from gang members, that petitions had not demonstrated they were targeted because of their political opposition to the gangs).

Zuniga-Espinoza v. Holder, 507 Fed. App'x 778 (10th Cir. 2013) (Honduran applicant did not show that it was more likely than not that he would suffer future persecution, based on alleged threats of harm from Mara gang, where alien had relocated back to his family village in another to avoid gang and lived there without any harm).

Delcid-Zelaya v. Holder, 534 Fed. App'x 694 (10th Cir. 2013) (concluding that El Salvadorans who are returning to El Salvador from the United States and perceived to be wealthy and fear persecution by gangs do not constitute a particular social group).

Diaz v. Holder, 501 Fed. App'x 734 (10th Cir. 2012) (upholding the denial of the alien's application where the applicant argued that he would be tortured if removed, based on his alleged attractiveness to drug traffickers operating in Guatemala because he had long resided in the United States and was fluent in English and on evidence of widespread official corruption in that country).

Cisneros-Diaz v. Holder, 415 Fed. App'x 940 (10th Cir. 2011) (holding that the record did not compel the conclusion that the government in El Salvador was unwilling or unable to control gang violence).

Orellana-Morales v. Holder, 377 Fed. App'x 798 (10th Cir. 2010) (holding that the record did not support conclusion that an applicant would likely be subjected to torture by, or with the acquiescence of, government officials in El Salvador, even though country reports supported the applicant's testimony that El Salvador had a serious problem with gang violence and that government efforts to address the problem had not been very successful, but the evidence did not demonstrate acquiescence in gang violence).

Wambugu v. Gonzales, 140 Fed. App'x 7 (10th Cir. 2005) (finding that an asylum applicant did not establish reasonable possibility that he might suffer serious harm upon removal to Kenya, on his application for humanitarian asylum, where violence experienced by alien by violent gangs had not been imposed by government of Kenya, government of Kenya had been attempting, and

was thus willing, to control activities of violent gangs, and government succeeded in quelling that violence).

Matter of S-E-G-, 24 I&N Dec. 579, 579, 588 (BIA 2008) (holding Salvadoran youth who had been subjected to MS-13 recruitment efforts and who rejected membership did not constitute a particular social group because the proposed group lacked social distinction).

Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2006) (The BIA has held that membership in a criminal gang "cannot constitute a particular social group").

Matter of V-T-S-, 21 I&N Dec. 792 (BIA 1997) (the Board has held that asylum applicants who fear crime is not sufficiently defined to constitute a particular social group, nor does the possibility of future victimization constitute persecution within the meaning of the Act).

Matter of Vigil, 19 I&N Dec. 572 (BIA 1988) (holding that forcible recruitment of young males by a guerrilla organization does not constitute persecution under the Act).

Sample Language

(b) (5) [redacted]

(b) (5)

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[redacted]

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GENERAL CRIME AND VIOLENCE

An applicant's fear of persecution cannot be based solely on general violence and civil disorder. *Matter of A-B-*, 27 I&N Dec. 316, 335 (A.G. 2018) ("Social groups defined by their vulnerability to private criminal activity likely lack [particularity] given that broad swaths of society may be susceptible to victimization."). As the Board noted in *Matter of W-E-V-G-*, "[t]he prevalence of gang violence in many countries is a large societal problem. The gangs may target one segment of the population for recruitment, another for extortion, and yet others for kidnapping, trafficking in drugs and people, and other crimes. Although certain segments of a population may be more susceptible to one type of criminal activity than another, the residents all generally suffer from the gang's criminal efforts to sustain its enterprise in the area. A national community may struggle with significant societal problems resulting from gangs, but not all societal problems are bases for asylum." 26 I&N Dec 227, 250-51 (BIA 2014).

Cases:

Jaramillo v. Ashcroft, 119 Fed. App'x 233 (10th Cir. 2004) (unpublished) (upholding IJs determination that general and widespread violence was inadequate to support an asylum application).

Matter of A-B-, 27 I&N Dec. 316, 335 (A.G. 2018) (finding victims of domestic violence committed by private actors do not form a particular social group).

Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000) (finding that mass human rights violations in a country do not suffice to prove that a particular respondent is more likely than not to be personally subjected to torture).

Matter of Y-B-, 21 I&N Dec. 1136 (BIA 1998) (a general fear of harm is not sufficient for a respondent to carry the burden of proof that he or she qualifies as a refugee).

Matter of E-P-, 21 I&N Dec. 860 (BIA 1997) (changed conditions of the country at issue, as properly established in the record of proceedings, may be a significant factor in concluding that an applicant has not established a well-founded fear of persecution).

Matter of S-P-, 21 I&N Dec. 486 (BIA 1996) (holding that in situations involving general civil unrest, the motive for harm should be determined by considering the statements or actions of the perpetrators; abuse or punishment out of proportion to nonpolitical ends; treatment of others similarly situated; conformity to procedures for criminal prosecution or military law; the application of anti-terrorism laws to suppress political opinion; and the subjection of political opponents to arbitrary arrest, detention, and abuse).

Matter of Mogharrabi, 19 I&N Dec. 439, 447 (BIA 1987) (stating that "aliens fleeing general conditions of violence and upheaval in their countries would not qualify for asylum").

Matter of Sanchez and Escobar, 19 I&N Dec. 276,284 (BIA 1985) (It also meant that generally harsh conditions shared by many others in a country and the harm arising out of civil strife did not amount to persecution within the meaning of our law… Furthermore, the tragic and widespread savage violence affecting all Salvadorans as the result of civil strife and anarchy is not persecution.").

Sample Language

(b) (5) [redacted]

HUMANITARIAN ASYLUM

An asylum applicant who has established past persecution but no longer has a well-founded fear of persecution may nevertheless warrant a discretionary grant of humanitarian asylum based not only on compelling reasons arising out of the severity of past persecution but also on a "reasonable possibility of other serious harm." 8 C.F.R. § 1208.13(b)(1)(iii)(B); *see Matter of N-M-A-*, 22 I&N Dec 312 (BIA 1998) (requiring compelling reasons for an alien's unwillingness to return to his country where his or her fear of future persecution is no longer reasonable). "Other serious harm" may be entirely unrelated to the past harm and need not be inflicted on account of race, religion, nationality, membership in a particular social group or political opinion but the harm must be so serious as to equal the severity of persecution. *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012). Importantly there is no requirement for nexus to a protected ground for humanitarian asylum.

Cases:
Yuk v. Ashcroft, 355 F.3d 1222 (10th Cir. 2004) (holding the third way to establish status as a refugee is to establish past persecution so severe that it demonstrates compelling reasons for being unwilling to return).

Krastev v. I.N.S., 292 F.3d 1268 (10th Cir. 2002) (quoting *Nazaraghaie v. INS*, 102 F.3d 460, 463 (10th Cir.1996)) ("We have held that the past persecution necessary to establish eligibility

for humanitarian asylum must have been so severe that it would 'it would be inhumane to force him to return there, even though he is in no danger of future persecution.'").

Woldemeskel v. I.N.S., 257 F.3d 1185 (10th Cir. 2001) (holding that past persecution was not severe enough where Amharic Ethiopian was tortured and kept in prison, but since released had married, had 2 children and lived in Ethiopia for many years).

Matter of L-S-, 25 I&N Dec. 705 (BIA 2012) (in determining whether an applicant has established a "reasonable possibility" of "other serious harm," adjudicators should focus on current conditions that could severely affect the applicant, such as civil strife and extreme economic deprivation, as well as on the potential for new physical or psychological harm that the applicant might suffer).

Matter of S-A-K & H-A-A, 24 I&N Dec. 464 (BIA 2006) (mother and daughter that underwent FGM and continue to suffer side effects were entitled to humanitarian asylum).

Matter of N-M-A-, 22 I&N Dec. 312 (BIA 1998) (requiring compelling reasons for an alien's unwillingness to return to his country where his or her fear of future persecution is no longer reasonable*).*

Matter of Chen, 20 I&N Dec. 16 (BIA 1989) (holding there may be cases where the favorable exercise of discretion is warranted for humanitarian reasons even if there is little likelihood of future persecution).

Matter of H-, 21 Dec. 337 (BIA 1996) (compelling factors include age, health, and family).

Sample Language

(b) (5)
[redacted]

[redacted]

HUMANITARIAN RELIEF

Immigration court has limited, jurisdiction and can grant only those forms of relief from removal that are expressly authorized by Congress. *Matter of Medina*, 19 I&N Dec. 734 (BIA 1988).

Cases:

Matter of Silvia- Rodriguez, 20 I&N Dec. 448 (BIA 1992) (holding that the Board has no discretionary authority to grant an alien relief from removal based solely on equitable or humanitarian grounds, or as a matter of public policy).

IN ABSENTIA

Under INA § 240(b)(5)(A) and 8 C.F.R. § 1003.26(c), the Immigration Judge shall order a Respondent who fails to appear "after written notice" (i.e. the NTA) under INA § 239(a)(1)-(2) removed in absentia if DHS demonstrates by clear and convincing evidence that written notice was, in fact, provided to the respondent or his or her counsel of record, and the respondent is removable.

If personal service is not practicable, written notice must be sent to the most recent address the respondent provided. INA § 240(b)(5)(A); 8 C.F.R. § 1003.26(d).No written notice is required, however, if the respondent fails to provide his or her address. INA § 240(b)(5)(b); 8 C.F.R. § 1003.26(d).

The Form I-213, Record of Deportable Alien, is sufficient for the government to meet its burden regarding removability. *See Matter of Gomez-Gomez*, 23 I&N Dec. 522 (BIA 2002) (finding that the government had met its burden of demonstrating the respondent's removability, primarily through the information contained in the I-213).

Many circuits distinguish a respondent's late arrival for a hearing from a determination that the respondent, in fact, failed to appear for a hearing. In circuits that follow this distinction, an in absentia order entered for a Respondent who was simply late is invalid, even if the rest of the statutory requirements above were met because the respondent did not actually fail to appear. The Tenth Circuit does not have precedent following this analysis.

An in absentia removal order may be rescinded only upon a motion to reopen, which is subject to both timing and numerical limitations. INA § 240(b)(5)(C).

Cases:

Tang v. Ashcroft, 354 F.3d 1192 (10th Cir. 2003) (reviewing precedent from multiple circuits, all holding that submission of a motion to change venue does not excuse a respondent's failure to appear).

INEFFECTIVE ASSISTANCE OF COUNSEL

Pursuant to *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), any appeal or motion based upon a claim of ineffective assistance of counsel requires:

> (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,

> (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
> (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Respondent must show that counsel's ineffective assistance prejudiced him. *Ochieng v. Mukasey*, 520 F.3d 1110, 1115 (10th Cir. 2008); *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003). To show prejudice, "the alien [must] demonstrate a reasonable likelihood that, but for the errors complained of, he would not have been deported." *United States v. Aguirre-Tello*, 353 F.3d 1199, 1208 (10th Cir. 2004).

The 90-day time limit to reopen, 8 U.S.C. § 1229a(c)(7)(C)(i), may be equitably tolled on the basis of ineffective assistance of counsel. *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002).

Cases:

Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (holding defense attorneys have an affirmative constitutional duty to advise noncitizen defendants of the potential immigration consequences of a criminal conviction).

Mena-Flores v. Holder, 776 F.3d 1152 (10th Cir. 2015) ("An attorney's objectively reasonable tactical decisions do not qualify as ineffective assistance.").

Singh v. Sessions, 688 Fed. App'x 581 (10th Cir. 2017) (questioning whether number limitation on motions to reopen may be equitably tolled).

Matter of Assaad, 23 I&N Dec. 553 (BIA 2003) (concluding a better translation would not have resulted in a different outcome in Respondent's case and therefore failed to demonstrate actual prejudice).

INTERNAL RELOCATION

An applicant for asylum "does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality ... [and] if under all the circumstances it would be reasonable to expect the applicant to do so." *Id*. Moreover, if the petitioner has not established past persecution, and if the alleged future persecution would not be by a government or be government-sponsored, the petitioner bears the burden of establishing that it would be unreasonable for her to relocate to escape persecution. 8 C.F.R. § 1208.13(b)(3)(i).

In *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 33, 36 (BIA 2012), the BIA addressed the substantive elements of relocation, concluding that the following two-step inquiry is required:

> (1) In order for an applicant to be able to relocate safely, there must be an area of the country where the circumstances are substantially better than those giving rise to a well-founded fear of persecution on the basis of the original claim; and that

(2) To determine whether relocation is reasonable, the adjudicator must balance the factors set forth at 8 CFR 1208.13 (b)(3) in light of the appropriate burden of proof. These factors include, but are not limited to, "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints such as age, gender, health and social and familial ties.

Key Questions:

(1) Could Respondent have relocated safely? Was there an area of the country where she has no well-founded fear of persecution?
(2) Would the new location have been substantially better?
(3) Is it reasonable to expect that Respondent should relocate to avoid future threat to her life and freedom? Consider age, gender, health, social and family ties, education, financial resources, social and cultural restraints, internal civil violence and other possible serious harm in place of suggested relocation. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 33-35 (BIA 2012).

If the Respondent has not established past persecution, she has the burden of demonstrating that internal relocation would not be a reasonable option to avoid future persecution. However, if the Court determines that the Respondent has established past persecution on account of a ground protected under the Act, the burden shifts to the Department of Homeland Security (DHS) to show, by a preponderance of the evidence, that it would be reasonable to expect the Respondent to relocate to avoid a future threat to her life or freedom. *Matter of D-I-M-*, 24 I&N Dec. 448,451 (BIA 2008).

If the persecutor is the government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless the Department establishes by a preponderance of the evidence that it would be reasonable for the applicant to relocate. *See* 8 C.F.R. § 1208.13(b)(3)(i)-(ii).

Cases:

INS v Ventura, 537 U.S. 12 (2002) (an individual who can relocate safely within his home country ordinarily cannot qualify for asylum).

Johan v. Filip, 309 Fed. App'x 227 (10th Cir. 2009) (unpublished) (holding that the Government's evidence of changed country conditions rebutted a presumption that the alien had a well-founded fear of future persecution.).

Gichema v. Gonzales, 139 Fed. App'x 90 (10th Cir. 2005) (unpublished) (holding alien failed to show that she could not have avoided future persecution by relocating to a bigger city in Kenya and that it was unreasonable to relocate and, thus, failed to qualify as a refugee entitled to asylum).

Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018) ("When the applicant has suffered personal harm at the hands of only a few specific individuals, internal relocation would seem more reasonable than if the applicant were persecuted, broadly, by her country's government.").

Matter of M-Z-M-R-, 26 I&N Dec. 28 (BIA 2012) (establishing two-step inquiry for internal relocation).

Matter of D-I-M-, 24 I&N Dec. 448 (BIA 2008) (factors that may be relevant in determining the reasonableness of relocation include whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. 8 C.F.R. § 1208.13(b)(3).).

Matter of C-A-L-, 21 I&N Dec. 754 (BIA 1997) ("This Board has found that an alien seeking to meet the definition of a refugee must do more than show a well-founded fear of persecution in a particular place within a country. He must show that the threat of persecution exists for him country-wide.")

Matter of R-, 20 I&N Dec. 621 (BIA 1992) (has not demonstrated countrywide persecution or mistreatment of Sikhs by the central government or other Indian groups).

Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987) (an applicant for asylum must show that her fear of persecution is country-wide).

Matter of Acosta, 19 I&N Dec. 211 (BIA 1985) (an applicant for asylum must show that her fear of persecution is country-wide.)

Sample Language:

(b) (5) [redacted]

INTERPRETER PROBLEMS

Respondent carries the burden to have all documents translated into English, 8 C.F.R. § 1003.33, and the Court may not compel any organization to offer such service. (b) (6) (b) (BIA Nov. 23, 2001).

Cases:

(b) (6) (BIA July 13, 2005) (finding respondent's difficulty understanding the interpreter was not supported by the record and respondent failed to demonstrate he was prejudiced).

(b) (6) (BIA July 30, 2002) (holding upon objection from counsel, the IJ was permitted to excuse the interpreter and permitted another interpreter to finish the hearing).

JUVENILE ASYLUM APPLICANTS

In cases involving minors seeking asylum, guidance from the UNHCR on evaluating child asylum claims should be given particular consideration. *See* UNHCR Guidelines on International Protection No. 8: Child Asylum Claims (Dec. 22, 2009). The UNHCR indicates that a child-sensitive application of the refugee definition is appropriate whenever the applicant in question is under age 18 and may have an individual claim to refugee status. *Id*. at 4-5. Thus, when analyzing child asylum claims, the harm should "be assessed from the child's perspective," which may include "an analysis as to how the child's rights or interests are, or will be, affected by the harm." *Id*. at 6. However, child asylum seekers are not automatically entitled to refugee status. *Id*. at 3-4.

Techniques for Interviewing Juvenile Applicants

> Selected excerpts from Jeff Weiss, Acting Director, INS Office of International Affairs, Guidelines for Children Asylum Issues (Dec. 10, 1998
>
> Child asylum applicants may be less forthcoming than adults and may hesitate to talk about past experiences in order not to relive their trauma.
>
> Girls and young women, in many cases, may be more comfortable discussing their experiences with women …, particularly in cases involving rape, sexual abuse, prostitution, and female genital mutilation (FGM).
>
> The child may be reluctant to talk to a stranger due to embarrassment or emotional upset and past trauma. Build a rapport with the child to elicit claims and to enable the child to recount his or her fears and/or past experiences. Keep in mind that, from the point of view of most applicants -- including children -- be culturally sensitive to the fact that every asylum applicant is testifying in a foreign environment and may have had experiences which give him or her good reason to distrust persons in authority. A fear of encounters with government officials in countries of origin may carry over to countries of reception. This fear may cause some children to be initially timid or unable to fully tell their story.
>
> Children may not understand questions and statements about their past because their cognitive and conceptual skills are not sufficiently developed… questions during the interview should be tailored to the child's age, stage of language development, background, and level of sophistication. In order to communicate effectively with a child asylum applicant…ensure that the Officer's questions -- and the child's answers -- are clearly understood.
>
> In certain cultures, “I don't know” is used when an individual has no absolute knowledge but has an opinion about the truth of the matter in question. For example, a child may respond “I don’t know” when asked who killed his or her parents, but upon further inquiry may state, for example, that everyone in his or her home village believes that it was government forces. Asylum Officers should generally probe further regarding these opinions. The child's awareness of community opinion may provide information about the issue in question even though the child may initially state “I don't know.”
>
> As a general rule, use short, clear, age-appropriate questions and sentences, avoiding long or compound questions. Use one or two syllable words in questions and avoid three or

four syllable words. For example, it is better to ask “Who was the person?” rather than “Identify the person.” Use simple, straight-forward questions: “What happened?” Avoid multi-word verbs: “Might it have been the case…?” Ask the child to define the use of a term or phrase in the question posed in order to check the child's understanding.

Choose easy words over hard ones: use expressions like “show,” “tell me about,” or “said” instead of complex words like “depict,” “describe,” or “indicate.”

Tolerate pauses, even if they are long.

Ask the child to describe the concrete and observable, not the hypothetical or abstract. Use visualizable terms (e.g., gun), instead of categorical terms (e.g., weapon). Reduce questions to their most basic and concrete terms.

Avoid the use of legalistic terms in questions, such as “persecuted” or “persecution.” Instead of “Were you persecuted?”, ask “Were you hurt?”

Use the active voice when asking a question (e.g., “Did the man hit your father?”). Avoid the passive voice (e.g., “Was your father hit by the man?”).

Avoid “front-loading” questions. Front-loading involves using a number of qualifying phrases before asking the crucial part of the question (i.e., questions that list several previously established facts before asking the question at hand). For example, “when you were in the house, on Sunday the third, and the man with the gun entered, did the man say …?” should be avoided.

Keep each question simple and separate. For example, a question like “Was your mother killed when you were 12?” should be avoided. The question asks about the child's mother and child's age at the same time.

Generally avoid leading questions whenever possible. Research reveals that children may be more highly suggestible than adults. Leading questions may influence them to respond inaccurately.

Use open-ended questions to encourage narrative responses. Children's spontaneous answers, although typically less detailed than those elicited by specific questioning, can be helpful in understanding the child's background. Try not to interrupt the child in the middle of a narrative response.

If you are asking questions more than once, explain to the child why you are doing so. Make clear to the child that he or she should not change or embellish earlier answers and explain that you are asking repeated questions to make sure you understand the story correctly. Repeated questioning is often interpreted (by adults as well as children) to mean that the first answer was regarded as a lie or wasn't the answer that was desired.

Do not expect children to be immediately forthcoming about events which have caused great pain.

Cases:

Halmenschlager v. Holder, 331 Fed. App’x 612, 614 (10th Cir. 2009) (determining that an asylum applicant’s request was properly denied because, inter alia, (1) the most troubling

incidents occurred before his homosexuality was apparent to others and without any connection to action or inaction by the government or entities or individuals it was unable or unwilling to control, (2) other than childhood "beatings" at the hands of other children, he related no instance of violence directed toward him because of his sexual preference, and (3) although he showed that homosexuals may be mistreated in Brazil, neither his testimony nor the documentary evidence required a finding that he faced persecution if returned to Brazil).

LANDOWNERSHIP (PSG)

The BIA has recognized that landownership may form the basis of a PSG. *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985) (shared past experiences, such as former military leadership or land ownership, can be immutable characteristics). In *Matter of C-A-*, 23 I&N Dec. 956, 960 (BIA 2006), the BIA explicitly pointed to "land ownership" as an example of an "easily recognizable trait" that is the cornerstone of a PSG.

Cases:

Zorig v. Holder, 349 Fed. App'x 306 (10th Cir. 2009) (affirming BIA's finding that financial gain rather than persecution on account of a political opinion required a respondent to divest his land).

Matter of J-B-N-, 24 I&N Dec. 208, 215 (BIA 2007) (family dispute over land was not on account of a protected ground).

Matter of X, --, (BIA Oct. 20, 1998) (evidence that deaf Thai woman could not own land/a home or obtain a driver's license did not amount to a showing of past persecution).

MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

An applicant seeking asylum or withholding of removal based on membership in a particular social group must clearly indicate on the record before the Immigration Judge the exact delineation of any proposed particular social group. INA § 208(b)(1)(B)(i); *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018).

For a proposed particular social group to be legally cognizable, and thus constitute a protected ground, the group must be (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014). Immutability requires group members share a characteristic they "cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985). For the group to be defined with particularity, it must create "well-defined boundaries" delineating "a discreate class of persons." *Matter of S-E-G-*, 24 I&N Dec. 579, 582, 584 (BIA 2008). Social distinction speaks to whether a group is in fact recognized as a group by society. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 236, 240-43 (BIA 2014) ("To be socially distinct, a group need not be seen by society; rather, it must be perceived as a group by society.").

"[A] particular social group *must* 'exist independently' of the harm asserted in an application for asylum or statutory withholding of removal." *See Matter of A-B-*, 27 I&N Dec. 316, 334 (A.G.

2018) (citing *M-E-V-G-*, 26 I&N Dec. at 236 n.11, 243; *W-G-R-*, 26 I&N Dec. at 215). *See also* UNHCR, Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02 (May 7, 2002). Otherwise, the need to conduct an independent analysis as to whether the alien has suffered persecution would be moot. *Matter of A-B-*, 27 I&N Dec. at 335.

An Immigration Judge has the duty to evaluate "any claim regarding the existence of a particular social group in a country … in the context of the evidence presented regarding the particular circumstances in the country in questions. *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), *overruled by Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

Cases:

Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018) ("Applying the canon of *ejusdem generis* … the phrase "particular social group" should be construed in a manner consistent with the other grounds for persecution in the statute's definition of refugee: race, religion, nationality, and political opinion.").

Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008) (finding "it is not enough to simply identify the common characteristic of a statistical grouping of a portion of the population at risk").

Matter of *A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007) (holding there is nothing particular or specific about being a victim of crime in an atmosphere of general strife and lawlessness).

Matter of C-A-, 23 I&N Dec. 951 (BIA 2006) (citing UNHCR, Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02 (May 7, 2002)) (finding "persecutory action toward a group may be a relevant factor in determining the visibility of a group in a particular society.").

MENTAL COMPETENCY

Determining competency:

In cases involving aliens with issues of mental competency, the Court may consider whether the alien lacks sufficient competency to meaningfully participate in immigration proceedings. *See Matter of M-A-M-*, 25 I&N Dec. 474, 479 (BIA 2011). Where indicia of mental incompetence exist, the Court must determine whether the alien lacks sufficient competency to proceed with the hearing. *Id.* at 478. Indicia of incompetency include a wide variety of observations and evidence, including the inability of a respondent to stay on topic or respond to questions, as well as medical evidence of incompetence, such as testimony from health professionals or social workers. *Id.* at 479-80.

Safeguards:

If the Court determines that a respondent lacks sufficient competency, it shall "prescribe safeguards to protect [his] rights and privileges" before going forward with the proceedings. *M-*

A-M-, 25 I&N Dec. at 478 (quoting INA§ 240(b)(3)); *Matter of M-J-K-*, 26 I&N Dec. 773, 775 (BIA 2016). The type and extent of these safeguards are within the discretion of the Court, so long as the alien is afforded a full and fair hearing. *Id.* at 479; 481-82 (citing *Reno v. Flores*, 507 U.S. 292, 306 (1993)).

Credibility:

In *Matter of J-R-R-A-*, the Board recognized that an individual "could be deemed competent for purposes of his hearing, although he has been diagnosed with a mental illness or serious cognitive disability, and may exhibit symptoms that affect his ability to provide testimony in a coherent, linear manner." 26 I&N Dec. 609, 611 (BIA 2015). The Board further explained that where the applicant has a "mental health condition that may result in delusions or an otherwise unreliable account of events, but where there may be no deliberate fabrication involved[,]" the applicant's testimony should generally be accepted, "even though his account may not be believable to others or otherwise sufficient to support his claim." *J-R-R-A-*, 26 I&N Dec. at 611-12 (BIA 2015). "The Immigration Judge should then focus on whether the applicant can meet his burden of proof based on the objective evidence of record." *Id*.

Competency related claims:

To determine whether respondent's fear of return to his home country is reasonable, the Court considers the various "suppositions" which would lead a respondent to be harmed on account of the protected ground and whether the "hypothetical chain of events" is possible. *Matter of J-F-F-*, 23 I&N Dec. 912, 917 (A.G. 2006). Factors to consider: lack of access to adequate medical attention, including medication and therapy; absence of a support network of family and friends; inability to obtain state-funded benefits and resources; respondent's awareness and understanding of his mental illness; and respondent's management or inability to manage his illness in the United States, evidenced by respondent's criminal history, homelessness, lack of steady employment, and the like.

Cases:

(b) (6) (BIA May 20, 2010) ("Mental disabilities are clearly immutable characteristics in that those suffering from them cannot change their disability."). The BIA further found those with severe mental illnesses are socially visible.

(b) (6) (BIA Sept. 07, 2005) (evidence did not demonstrate a widespread use of psychiatric methods against political prisoners).

--, A -- (BIA Nov. 15, 2013) (finding immutability because bipolar illness is permanent regardless of medication).

--, A -- (BIA May 31, 2007) (finding "Peruvian psychiatric patients with serious and chronic mental illness" are a valid particular social group).

(b) (6) (BIA Jan. 29, 2010) (mental illness was not a particular social group and respondent did not demonstrate persecution on account of a protected ground).

MIXED MOTIVE CLAIMS

In mixed-motive cases an applicant is required to establish that race, religion, nationality, membership in a particular social group, or political "was or will be at least one central reason for persecuting the applicant." INA § 208(b)(1)(B)(i).

The BIA recognizes actionable mixed motive cases where persecutors may have legitimate reasons for their actions, but an additional central reason for their actions is persecution on account of a protected category. *See Matter of S-P-*, 21 I&N Dec. 486, 492 (BIA 1996) (finding investigation of terrorism is not harm perpetrated on account of a protected ground for asylum purposes). The BIA recognizes a distinction between legitimate investigation and what is instead a pretext for persecution In *Matter of S-P-*, 21 I&N Dec. at 493, the BIA listed several factors for courts to consider when determining the motive of a persecutor:

(1) Indications in the particular case that the abuse was directed toward modifying or punishing opinion rather than conduct;
(2) Treatment of others in the population would be confronted by government agents in similar circumstances;
(3) Conformity to procedures for criminal prosecution or military law including developing international norms regarding the law of war;
(4) The extent to which anti-terrorism laws are defined and applied to suppress political opinion as well as illegal conduct.
(5) The extent to which suspected political opponents are subjected to arbitrary arrest, detention and abuse.

Cases:

Dallakoti v. Holder, 619 F.3d 1264 (10th Cir. 2010) (the court found that the record contained scant and inconsistent testimony about political opinions-not the compelling evidence required to overturn the BIA's finding "that the Maoists' threats were motivated by the ability of [the applicant] to supply needed financial resources.").

Zorig v. Holder, 349 Fed. App'x 306 (10th Cir. 2009) (the BIA's denial of asylum affirmed because an applicant failed to demonstrate that the BIA applied the incorrect mixed-motive standard).

Matter of N-M-, 25 I&N Dec. 526 (BIA 2011) (the BIA set forth a higher standard of proof in whistleblower cases, required that an applicant establish that one central reason for the persecutor's actions was the whistleblowing activity).

Matter of J-B-N- & S-M-, 24 I&N Dec. 208 (BIA 2007) (in interpreting the one central reason standard, the BIA affirmed its decision in *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996), which held that an applicant does not bear the "unreasonable burden" of establishing the exact motivation.). The Board also found that mixed motive can be established by testimonial evidence, by "direct or circumstantial evidence," and that the protected ground cannot be "incidental, superficial or subordinate to another reason for harm." *Id.* at 214.

NEXUS

For persecution to be "on account of" membership in a social group for purposes of 8 U.S.C.S. § 1101(a)(42)(A), a victim's protected characteristic must be central to the persecutor's decision to act against the victim. An applicant qualifies as a "refugee" under the Immigration and Nationality Act if membership in a social group is at the root of persecution, such that membership itself generates a specific threat to the applicant. *Niang v. Gonzales*, 422 F.3d 1187, 1190 (10th Cir. 2005). "Reasons incidental, tangential, or subordinate to the persecutor's motivation will not suffice." *Matter of A-B-*, 27 I&N Dec. 316, 338 (A.G. 2018) (citing *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)).

Cases:

Karki v. Holder, 715 F.3d 792 (10th Cir. 2013) (the court reversed the BIA's incorrect determination denying asylum on the grounds that a political group was motivated only by their desire to recruit the alien to their cause or extort money from him).

Niang v. Gonzales, 422 F.3d 1187 (10th Cir. 2005) (noting that the persecution at issue in *Niang*, the forcible, painful cutting of a female's body parts, is not a result of a woman's opposition to the practice but rather a result of her sex and her clan membership and/or nationality).

Nkwonta v. Mukasey, 295 Fed. App'x 279 (10th Cir. 2008) (an applicant failed to show that a nexus existed between his fear of future persecution and his past membership in a student-cult group because his claim did not fall within one of the five statutory grounds for asylum).

NOTICES TO APPEAR

Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. 8 C.F.R. § 1003.14(a). When an Immigration Judge has jurisdiction over an underlying proceeding, sole jurisdiction over applications for asylum shall lie with the Immigration Judge. 8 C.F.R. § 1003.14(b).

ONE-YEAR DEADLINE BAR TO ASYLUM

In general, an asylum applicant must either (1) demonstrate that his or her asylum application was filed "within one year after the date" of the applicant's last entry into the United States or (2) demonstrate that he or she is eligible for an exemption to this requirement due to "changed circumstances" relevant to eligibility or "extraordinary circumstances" relevant to the filing delay. INA § 208(a)(2)(B); INA § 208(a)(2)(D).

Applicants who are eligible for one of the exemptions must still file the asylum application within a "reasonable period." 8 C.F.R. §§ 208.4(a)(4)(ii), 1208.4(a)(4)(ii) (requiring submission within "reasonable period" given changed circumstances); 8 C.F.R. §§ 208.4(a)(5), 1208.4(a)(5) (requiring submission within "reasonable period" given extraordinary circumstances).

The one-year filing deadline is calculated from the date of the applicant's "last arrival" in the United States or April 1, 1997, whichever is later. 8 C.F.R. §§ 208.4(a)(2)(ii), 1208.4(a)(2)(ii). The Tenth Circuit has interpreted "last arrival" to mean something other than the individual's most recent physical entry into the country. *See Diallo v. Gonzales*, 447 F.3d 1274, 1282 (10th Cir. 2006) (holding that one-year filing period for applicant whose previous asylum status was terminated begins on the date of termination).

The term “changed circumstances” includes “[c]hanges in conditions in the applicant's country of nationality” or “[c]hanges in the applicant's circumstances ... including ... activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk.” 8 C.F.R. § 1208.4(a)(4)(i)(A),(B). Furthermore, an alien’s legal status in the United States may qualify as a changed circumstance excusing them from a late asylum filing. 8 C.F.R. § 1208.4(a)(4)(A) (stating that changes in the applicant’s circumstances that materially affect the applicant’s eligibility for asylum qualify as a changed circumstance.)

Extraordinary circumstances are events or factors that caused the failure to meet the one-year deadline. 8 C.F.R. § 1208.4(a)(5). To show an extraordinary circumstance, the applicant must show “that the circumstances were not intentionally created by the alien through his or her own action or inaction, that those circumstances were directly related to the alien’s failure to file the application within the 1-year period, and that the delay was reasonable under the circumstances.” 8 C.F.R. § 1208.4(a)(5). Examples include serious illness, mental or physical disability, ineffective assistance of counsel, and maintaining lawful status or parole until a reasonable period before the filing of the asylum application. 8 C.F.R. § 1208.4(a)(5)(i)-(iv). This list is illustrative but not exhaustive. *See* INA § 208(a)(2)(E); 8 C.F.R. § 1208.4(a)(5).One year filing deadline for asylum does not apply to unaccompanied minors and lawful permanent residents who maintain status throughout proceedings. 8 C.F.R. § 208.4(a)(5)(ii), (iv); 8 C.F.R. § 1208.4(a)(5). The one year filing deadline does apply to minor principal applicants who are living with a parent or legal guardian and for adult principal applicants. *Id*. If a child is not living with a parent or legal guardian but is in lawful status, the child is not considered an unaccompanied child and therefore is not categorically exempt from the one year filing deadline. INA § 208(a)(2)(E).

Cases:

Sviridov v. Ashcroft, 358 F.3d 722 (10th Cir. 2004) (holding that the court lacked jurisdiction to review an immigration judge's denial of asylum on the exclusive ground of untimeliness).

Tsevegmid v. Ashcroft, 336 F.3d 1231 (10th Cir. 2003) (the court lacked jurisdiction to review determination of Immigration Judge that applicant did not file asylum application within applicable one-year deadline and did not show any circumstances excusing his tardiness).

Ilioi v. Holder, 566 Fed. App’x 652 (10th Cir. 2014) (holding the court lacked jurisdiction to review the determination by BIA that a Romanian applicant was not eligible for asylum because his application was not filed within the applicable one-year period, and that, even assuming changed circumstances, the application, filed 16 months after the alleged changed circumstances took effect was not filed within a reasonable period after those changed circumstances).

Sikder v. Gonzales, 227 Fed. App’x 723 (10th Cir. 2007) (the one-year limitations period for filing asylum application did not violate alien’s equal protection rights, where distinction between similarly-situated asylum applicants was rationally related to a legitimate government purpose, i.e., identifying those aliens who immediately indicate a desire to stay in the United States because of a genuine threat of persecution).

Leonard v. Gonzales, 216 Fed. App’x 781 (10th Cir. 2007) (an applicant’s claim that alleged factual circumstances involved in the delayed filing of his asylum application warranted an exception to the one-year filing deadline did not raise a constitutional claim and was a

discretionary decision of the immigration judge, and therefore was not subject to judicial review).

Matter of M-A-F-, 26 I&N Dec. 651 (BIA 2015) (a subsequent asylum application is properly viewed as a new application if it presents a previously unraised basis for relief or is predicated on a new or substantially different factual basis, and the filing date for the later asylum application controls for purposes of determining whether the one year statutory time bar applies under Section 208(a)(2)(B) of the Act).

Matter of T-M-H- & S-W-C-, 25 I&N Dec. 193 (BIA 2010) (holding that for an application to be considered timely, an alien should generally apply for asylum as soon as possible after the expiration of his or her valid status).

Matter of F-P-R-, 24 I&N Dec. 681 (BIA 2008) (the term "last arrival" refers to the alien's most recent arrival in the United States from a trip abroad).

Matter of Y-C-, 23 I&N Dec. 280 (BIA 2002) (holding moving to a new city is not an "extraordinary circumstance" that would excuse Respondent for his untimely application).

Sample Language

(b) (5) [redacted]

[redacted]

PARTICULARLY SERIOUS CRIMES

An applicant is ineligible for asylum and withholding of removal under the Act and the CAT if she has been convicted of a particularly serious crime. *See* INA § 208(b)(2)(A)(ii); INA § 241(b)(3)(B)(ii); 8 C.F.R. § 1208.106(d)(2). For purposes of asylum, an applicant "who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." INA § 208(b)(2)(B)(i). For purposes of withholding of removal under the Act and the CAT, an applicant convicted of an aggravated felony or felonies for which she has been sentenced to an aggregate term of imprisonment for at least five years is considered to have been convicted of a particularly serious crime. INA § 241(b)(3)(B); 8 C.F.R. § 1208.16(d)(2).

An offense may still be particularly serious even if it is not an aggravated felony under the Act. *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007) *aff'd N-A-M- v. Holder*, 587 F.3d 1052 (10th Cir. 2009). The factors considered in judging the seriousness of the crime include the nature of the offense, the circumstances and facts of the crime, the type of sentence imposed, and whether the circumstances of the crime indicate that the alien will be a danger to the community. *Id*. When the crime is against a person, the likelihood that the offense will be classified as a particularly serious crime is increased. *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982) (finding that a respondent's conviction for burglary of a dwelling was not a particularly serious crime as to preclude relief), *modified on other grounds*, *Matter of Gonzalez*, 19 I&N Dec. 682 (BIA 1988) (holding that two convictions for trafficking heroin were particularly serious crimes, which rendered the alien a danger to the community).

An alien who has conceded removability has the "burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion." 8 C.F.R. § 1240.8(d); *see Garcia v. Holder*, 584 F.3d 1288, 1289–90 (10th Cir. 2009) (holding that an alien failed to establish that he was eligible for cancellation of removal, temporary protected status, or voluntary departure where he did not demonstrate his conviction was not a CIMT). Thus, a respondent has the burden to demonstrate that her criminal convictions are not particularly serious crimes. *See, e.g.*, *Espitia v. Lynch*, 625 Fed. App'x 882 (10th Cir. 2015).

Cases:

Espitia v. Lynch, 625 Fed. App'x 882 (10th Cir. 2015) (finding that because a petitioner failed to demonstrate that his controlled substance convictions in violation of California Health & Safety Code § 11360(a) were not particularly serious crimes, a mandatory ground for the denial of relief, the BIA correctly ruled that he did not show he was eligible for adjustment of status, cancellation of removal, or asylum). The Court did not discuss the particular controlled substance involved and stated only that the petitioner was convicted of "selling or transporting a controlled substance." *Id*. at 884.

Diaz v. Holder, 501 Fed. App'x 734 (10th Cir. 2012) (the Tenth Circuit affirmed the BIA's finding that an applicant's drug offense for violating Wyoming Statutes Annotated § 35-7-1031(a)(ii) for selling 16 ecstasy pills was a particularly serious crime).

Zhen v. Gonzales, 175 Fed. App'x 222 (10th Cir. 2006) (an alien was ineligible for asylum because of his conviction for concealing and harboring illegal aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(iii) and sentence of 233 days). The court found that the conviction was an aggravated felony and that he was deemed to have been convicted of a particularly serious crime.

Matter of Y-L-, A-G-, R-S-R-, 23 I&N Dec. 270 (A.G. 2002) (an applicant convicted of an offense involving unlawful trafficking in controlled substances (cocaine) will presumptively be deemed to have been convicted of a particularly serious crime). To overcome that presumption, an individual must demonstrate extenuating circumstances that are both extraordinary and compelling, which includes all of the following. (1) a very small quantity of controlled substance; (2) a very modest amount of money paid for the drugs in the offending transaction; (3) merely peripheral involvement by the alien in the criminal activity, transaction, or conspiracy; (4) the absence of any violence or threat of violence, implicit or otherwise, associated with the offense; (5) the absence of any organized crime or terrorist organization

involvement, direct or indirect, in relation to the offending activity; and (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles.

Matter of G-G-S-, 26 I&N Dec. 339 (BIA 2014) (holding that "an alien's mental health as a factor in a criminal act falls within the province of the criminal courts and is not considered in assessing whether the alien was convicted of a particularly serious crime for immigration purposes").

Matter of Carballe, 19 I&N Dec. 357 (BIA 1986) (no independent finding of "danger to the community" is needed, because it follows that the applicant is a danger to the community by way of committing a particularly serious crime).

PAST PERSECUTION

Persecution is a threat to life or freedom or the infliction of suffering or harm upon those who differ in a way that is regarded as offensive. *Woldemeskel v. INS*, 257 F.3d 1185, 1188 (10th Cir. 2001); *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985). For such acts to rise to the level of persecution, they must be "more than just restrictions or threats to life and liberty." *Woldemeskel*, 257 F.3d at 1188; *see also Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1337 (10th Cir. 2008). Persecution, within the meaning of the Act, does not encompass all treatment that society regards as unfair, unjust, unlawful or unconstitutional. *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997).

Serious violations of basic human rights constitute persecution. *Matter of T-*, 20 I&N Dec. 571 (BIA 1992). The determination of whether mistreatment rises to the level of persecution must be made on a case-by-case basis. *Matter of C-Y-Z-*, 21 I&N Dec. 915, 924 (BIA 1997).

A finding of past persecution alone can qualify an applicant for asylum, as it gives rise to a regulatory presumption that the applicant has a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(1); *Matter of D-I-M-*, 24 I&N Dec. 448, 450 (BIA 2008). In the absence of past persecution, an alien must otherwise establish a well-founded fear of future persecution. *Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987).

Cases:

Matter of A-E-M-, 21 I&N Dec.1157 (BIA 1998) (holding that the reasonableness of an alien's fear of persecution is reduced when his family remains in his native country unharmed for a long period of time after his departure).

PATTERN OR PRACTICE OF PERSECUTION

In well-founded fear cases, the applicant need not establish that he will be "singled out" individually for persecution if he can show that there is a "pattern or practice" of persecuting others similarly situated to the applicant in his country and that the applicant "is included in, or identified with, the persecuted group." 8 C.F.R. §§ 208.13(b)(2)(iii)(A)-(B); 8 C.F.R. §§ 1208.16(b)(2)(i)-(ii); *Woldemeskel v. INS*, 257 F.3d 1185 (10th Cir. 2001); *Matter of A-M-*, 23 I&N Dec. 737, 740 (BIA 2005) (holding the record did not support a finding that Chinese

Christians in Indonesia were systematically or pervasively persecuted by the government). Persecution must be systemic or pervasive. *Woldemeskel*, 257 F.3d 1185, 1190 (10th Cir. 2001).

The Tenth Circuit has not adopted the "disfavored group" approach in *Sael v. Ashcroft*, 386 F.3d 922, 925 (9th Cir. 2004), holding an applicant may establish eligibility for relief by "prov[ing] that []he is a member of a 'disfavored group' coupled with a showing that []he, in particular, is likely to be targeted as a member of that group." *Kasonso v. Holder*, 445 Fed. App'x 76 (10th Cir. 2011).

An Immigration Judge may consider evidence of pervasive persecution, regardless of whether a pattern or practice claim is made. *Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987) (stating that where the country at issue has a history of persecuting people in circumstances similar to those of the asylum-seeker, careful consideration should be given to that fact).

Cases:

Pyakurel v. Lynch, 630 Fed. App'x 852 (10th Cir. 2015) (upholding the BIA's finding that respondent failed to demonstrate Maoists in Nepal engaged in a pattern or practice of persecuting artists when record only established that artists were recruited to the Maoists cause).

(b) (6) (BIA Dec. 15, 2008) (holding the record did not establish a threat of harm to young women in Albania by the government, or by forces that the government is unable or unwilling to control, that is so systemic or pervasive as to amount to a pattern or practice of persecution).

(b) (6) (BIA Aug. 19, 2005) (evidence of considerable difficulties "experienced by Afro-Colombians in their country [was] insufficient [] to establish a prima facie case of a pattern or practice of persecution").

(b) (6) (BIA May 10, 1996) (finding adequate proof in the record to demonstrate that Hutus "have and are continuing to engage in organized and systematic persecution of the Tutsi tribe in Rwanda").

PERSONAL DISPUTES

Asylum is not a remedy for private acts by one citizen or group of citizens against another. It only affords international protection in cases where "the bonds of trust, loyalty, protection, and assistance existing between a citizen and the country have been broken and have been replaced by the relation of an oppressor to a victim." *Matter of Acosta*, 19 I&N Dec. 211, 235 (BIA 1985). Thus, personal claims are not protected by the INA. *See Matter of E-A-G-*, 24 I&N Dec. 591(BIA 2008) (citing *Adebisi v. INS*, 952 F.2d 910 (5th Cir. 1992)) (finding an alien's fear of persecution was the result of a personal dispute and not the conduct of the government or a group that the government was unable or unwilling to control, the alien was not entitled to asylum or withholding of deportation); *Campos-Guardado v. INS*, 809 F.2d 285, 290 (5th Cir. 1987) (stating that "Congress did not intend to confer eligibility for asylum on all persons who suffer harm from civil disturbances").

Cases:

Hayrapetyan v. Mukasey, 534 F.3d 1330 (10th Cir. 2008) (noting "retaliation [] carried out by mere civilians by personal vengeance" is not a basis for asylum).

Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018) ("An alien may suffer threats and violence in a foreign country for any number of reasons relating to her social, economic, family, or other personal circumstances. Yet the asylum statute does not provide redress for all misfortune.").

Matter of C-T-L-, 25 I&N Dec. 341 (BIA 2010) (indicating that threats of a "personal or retaliatory nature" were not because of the applicant's political opinion or membership in a particular social group).

Matter of Y-G-, 20 I&N Dec. 794 (BIA 1994) ("Aliens fearing retribution over purely personal matters will not be granted asylum on that basis.").

Matter of Pierre, 15 I&N Dec. 461, 463 (BIA 1975) (holding that a husband's threats against his wife were "strictly personal," even though he was a Haitian government official, and, thus, she did not establish persecution).

PHYSICAL BEATINGS AND THREATS OF PHYSICAL HARM

Persecution is "more than just restrictions or threats to life and liberty." *Woldemeskel v. INS*, 257 F.3d 1185, 1188 (10th Cir. 2001); *see also Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1337 (10th Cir. 2008). The BIA has addressed the issue of unfulfilled threats and has found that not all threats rise to a meaningful level of persecution. *Matter of Z-Z-O*, 26 I&N Dec. 586, 589 (BIA 2015) (holding "unfulfilled threats constitute harassment rather than persecution," and for the principle that "threats standing alone…constitute past persecution only in a small category of cases and only when threats are so menacing as to cause significant actual suffering or harm").

However, cumulative threats may constitute persecution. The BIA has recognized the necessity to consider the cumulative effects of abuse and has found persecution arising from the totality of the circumstances, even when no single incident of abuse occurred, constituted persecution in and of itself. *See Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 25-26 (BIA 1998).

Cases:

Ritonga v. Holder, 633 F.3d 971 (10th Cir. 2011) (holding persecution is the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive and must entail more than just restrictions or threats to life and liberty).

Hayrapetyan v. Mukasey, 534 F.3d 1330 (10th Cir. 2008) (aliens cumulative harm, including threats, rose to the level of past persecution).

Sidabutar v. Gonzales, 503 F.3d 1116 (10th Cir. 2007) (finding no persecution in the case of an Indonesian Christian who was seriously injured and repeatedly beaten by classmates, who was often robbed, and who once had his motorcycle burned by a mob).

Tulengkey v. Gonzales, 425 F.3d 1277 (10th Cir. 2005) (no persecution in case where alien was robbed and sexually assaulted and suffered a head injury).

Wiransane v. Ashcroft, 366 F.3d 889 (10th Cir. 2004) ("Although persecution is not defined in the INA, we have held that a finding of persecution requires the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive and must entail more than just restrictions or threats to life and liberty.").

Vatulev v. Ashcroft, 354 F.3d 1207 (10th Cir. 2003) (finding threats alone generally do not constitute actual persecution; only rarely, when they are so immediate and menacing as to cause significant suffering or harm in themselves, do threats per se qualify as persecution).

Nazaraghaie v. INS, 102 F.3d 460 (10th Cir. 1996) (finding a severe beating and ten-month imprisonment of respondent amounted to persecution).

Kapcia v. INS, 944 F.2d 702 (10th Cir. 1991) (finding no past persecution where one petitioner was arrested four times, detained three times, beaten once, his house was searched and he was treated adversely at work, and another petitioner was twice detained for two days, and interrogated and beaten).

Ilioi v. Holder, 566 Fed. App'x 652 (10th Cir. 2014) (holding that "being taunted, ridiculed, and beaten by teachers at grade school for being Pentecostal, and having rocks thrown at [respondent] by schoolmates [did] not rise to the level of persecution").

Jin Bin Wu v. Holder, 481 Fed. App'x 427 (10th Cir. 2012) (unpublished) (holding an arrest or threat of arrest does not in itself entail persecution).

Djap v. Ashcroft, 113 Fed. App'x. 376 (10th Cir. 2004) (finding that "the mistreatment [petitioner] experienced was insufficient to rise to the level of persecution" in the case of an ethnically Chinese Indonesian who claimed that, because of his ethnicity, he was beaten and robbed by native Indonesians and that his shop was looted and burned during the 1998 riots).

Matter of Z-Z-O, 26 I&N Dec. 586 (BIA 2015) (finding that the notice informing the respondent and his wife that one of them should be sterilized was not a threat that rose to the level of persecution).

Matter of G-K-, 26 I&N Dec. 88 (BIA 2013) (finding that threatening telephone calls alien received were made in 2005 were dated and did not contain specific serious threats to rise to the level of torture).

Matter of O-Z- & I-Z-, 22 I&N Dec. 23 (BIA 1998) (holding that the multiple beatings, repeated and personalized threats delivered to the respondent's home, the vandalization and destruction of property, and the intimidation and humiliation of his son, inflicted on account of his Jewish nationality, constituted past persecution).

Matter of B-, 21 I&N Dec. 66 (BIA 1995) (alien suffered past persecution when he was arrested and detained for over a year and was interrogated, beaten, and shocked once or twice a week during the first 3 months of detention).

Matter of Chen, 20 I&N Dec. 16 (BIA 1989) (finding lack of evidence that respondent suffered significant physical harm or injury during his incarceration did not amount to persecution, only that respondent was exposed to general violence, threats, and mistreatment).

POLITICAL OPINION

An applicant is eligible for asylum if he can demonstrate persecution on account of his political opinion. 8 C.F.R. §§ 1208.13(b)(1); 1208.13(b)(2).

To show persecution on account of one's political opinion, an applicant must show that he held political opinions of which his persecutors were aware of, that he had been persecuted or has a well-founded fear of future persecution, and that the persecution had been or would be because of his political opinion. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *Mogollon v. Ashcroft*, 99 Fed. App'x 183, 187 (10th Cir. 2004) (citing *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997)). "The persecution must derive from [the applicant's] own political beliefs, not those of his persecutors and petitioners had to show 'something more than violence plus disparity of views,'" *Id*. (citation omitted).

Cases:

Elias-Zacarias, 502 U.S. 478 (1992) (rejecting the view that "not taking sides with any political faction is itself the affirmative expression of a political opinion").

Karki v. Holder, 715 F.3d 792 (10th Cir. 2013) (finding Maoists' actions towards the applicant was to overcome his political opinion based on forcible recruitment efforts resulting from the applicant's political activities and the persecutor's references to the applicant's political affiliation).

Hayrapetyan v. Mukasey, 534 F.3d 1330 (10th Cir. 2008) (Armenian reporter's threatened exposure of institutional government corruption was sufficient to find that she was politically persecuted).

Lysak v. Lynch, 631 Fed. App'x 579 (10th Cir. 2015) (finding refusal to pay a bribe to police was not on account of the applicant's political opinion because it could have been attributed to the applicant's opposition to corruption).

Arraez Brandy v. Holder, 590 Fed. App'x 744 (10th Cir. 2014) (finding the "necessary link between being a stockbroker and being perceived to have a particular political opinion, specifically that '[t]he Chavez government has imputed an anti-regime political opinion to former stockbrokers and others working in the stock market and has labeled them as traitors'" was missing).

Carranza-Quinones v. Mukasey, 280 Fed. App'x 753 (10th Cir. 2008) (in whistleblower cases, "the salient question is whether [the whistleblower's] actions were directed toward a governing institution, or only against individuals whose corruption was aberrational") (quoting *Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000)).

Ustyan v. Ashcroft, 94 Fed. App'x 774 (10th Cir. 2004) (finding the recruitment by opposing sides in Georgian war was not persecution on account of a political opinion or Armenian heritage, despite the applicant's wish to remain neutral).

Matter of N-M-, 25 I&N Dec. 526 (BIA 2011) (noting "opposition to state corruption may provide evidence of an alien's political opinion or give a persecutor reason to impute such beliefs to an alien"). In making the nexus determination, an Immigration Judge should consider: (1) whether and to what extent the alien engaged in activities that could be perceived as expressions of anticorruption beliefs; (2) any direct or circumstantial evidence that the persecutor was motivated by the alien's actual or perceived anticorruption beliefs; and (3) any evidence regarding the pervasiveness of corruption within the governing regime. *Id*.

Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008) (a young man from Honduras who resisted joining the Mara Salvatrucha would not be persecuted on account of his political opinion or imputed political opinion by that gang).

Matter of T-M-B-, 21 I&N Dec. 775 (BIA 1997) (criminal extortion efforts do not constitute persecution on account of political opinion where it is reasonable to conclude that those who threatened or harmed the alien were not motivated by her political opinion).

Matter of S-P-, 21 I&N Dec. 486 (BIA 1996) (recognizing imputed political opinion has been held to be a protected statutory ground for asylum).

Matter of Chang, 20 I&N Dec. 38 (BIA 1989) (superseded on other grounds, *Matter of X-P-T-*, 21 I&N Dec. 634 (BIA 1996) (holding that harm is not on account of political opinion when it is inflicted regardless of the victim's opinion rather than because of the opinion.

Matter of Acosta, 19 I&N Dec. 211 (BIA 1985) (the mere fact that a group may have a "general political motive" in causing societal instability does not mean that every victim of that group's violence was persecuted on account of their political opinion).

PRECEDENT: APPLYING TENTH CIRCUIT LAW

Only a circuit's precedent binds immigration courts when the adjudicating case arises within that circuit. However, other circuit precedent is persuasive authority and may still be considered.

Cases:

Matter of Ponce de Leon, 21 I&N Dec. 154 (BIA 1996) (noting that the Board and IJ are only bound by a circuit court's precedent when adjudicating cases arising within that circuit).

Matter of Anselmo, 20 I&N Dec. 25 (BIA 1989) (noting that the Board has "historically followed a court's precedent in cases arising in that circuit").

Matter of Fede, 20 I&N Dec. 35 (BIA 1989) (stating that authority from one circuit is not binding in another).

PRETERMISSION FOR ASYLUM

An Immigration Judge has the authority to pretermit an asylum application if the alien does not show *prima facie* eligibility. 8 C.F.R. § 1240.11(c)(3). The Board noted that a full oral examination of an asylum application is "an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and the integrity of the asylum process." *Matter of E-F-H-L-*, 26 I&N Dec. 319 (BIA 2014) (quoting *Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989). The Board's holding in *Matter of E-F-H-L-* applies equally to withholding only proceedings.

Attorney General Sessions referred the decision of the Board of Immigration Appeals in *Matter of E-F-H-L-*, 26 I&N Dec. 319 (BIA 2014), to himself for review and vacated that decision. The AG's decision is very vague but suggests some type of "summary dismissal without hearing" process for those who fail to establish a "prima facie case" for asylum or withholding. *See Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018).

PREVIOUS ASYLUM APPLICATIONS

An alien who was previously denied asylum is barred from again applying for asylum. *See* INA § 208(a)(2)(C).

If a final order of removal was issued, an alien may only file for asylum through a motion to reopen and under the "changed country condition" standards if it is beyond the 90-day period for a motion to reopen. INA § 208(a)(2)(D); *see also* INA § 240(c)(7)(C)(ii).

PROSECUTION VERSUS PERSECUTION

Criminal prosecution is not persecution unless it is motivated by a protected ground. *Matter of Maccaud*, 14 I&N Dec. 429 (BIA 1973).

Cases:

Sadeghi v. INS, 40 F.3d 1139 (10th Cir. 1994) (holding petitioner had the burden of proof, he had the burden of proving that the Iranian government sought him for purposes of persecution, rather than for the legitimate purpose of criminal prosecution).

Kapcia v. I.N.S., 944 F.2d 702 (10th Cir. 1991) (affirming that the Board pointed out that the conviction and fine for distribution of illegal material is a legitimate government act and not persecution as contemplated by the Act).

Matter of H-M-, 20 I&N Dec. 683 (BIA 1993) (where an asylum applicant violates currency laws which a government has a legitimate right to enforce, and he suffers harsh treatment as a result, the applicant must show that the government in question has punished him "on account of" his political opinion and not for the violation of the currency laws).

Matter of Izatula, 20 I&N Dec. 149 (BIA 1990) (prosecution for an attempt to overthrow a lawfully constituted government does not constitute persecution, but this rule does not necessarily apply to countries where a coup is the only means of effectuating political change).

Sample Language

(b) (5) [redacted]

PROSECUTORIAL DISCRETION

To the extent that the Respondent seeks a favorable exercise of prosecutorial discretion or requests a grant of deferred action, humanitarian parole, or a stay of his removal order, he may pursue his requests with the DHS. NOTE: Immigration courts have experienced a decreased in the Department's use of prosecutorial discretion since June 2017. *See* Enforcement of the Immigration Laws to Serve the National Interest (DHS memo from Sec. John Kelly to Kevin McAleenan, Acting Commissioner, U.S. Customs and Border Protection, et al., Feb. 20, 2017).

Cases:

Matter of Quintero, 18 I&N Dec. 348 (BIA 1982) (explaining that prosecutorial discretion is a function of DHS).

Matter of G-N-C-, 22 I&N Dec. 281 (BIA 1998) (decision by DHS to institute removal or other proceedings, or to cancel a NTA or other charging document before jurisdiction vests with the IJ, involves the exercise of prosecutorial discretion and is not a decision that the IJ or the Board may review).

PSYCHOLOGICAL HARM

There may be cases where a person persecutes someone close to an applicant, such as a spouse, parent, child or other relative, with the intended purpose of causing emotional harm to the applicant, but does not directly harm the applicant himself. However, in such a case, the persecution would not be "derivative," as the applicant himself would be the target of the emotional persecution that arises from physical harm to a loved one. Automatically treating harm to a family member as being persecution to others within the family is inconsistent with the derivative asylum provisions, as it would obviate the need for these provisions in many respects. *Matter of A-K-*, 24 I&N Dec. 275, 278 (BIA 2007) (holding that an alien may not establish eligibility for asylum or withholding of removal based solely on the fear that his or her daughter will be harmed by being forced to undergo female genital mutilation upon returning to the alien's home country).

REINSTATEMENT OF FORMER ORDER OF REMOVAL

The Department has the authority to reinstate an alien's prior order of removal. INA § 241(a)(5). If the Attorney General finds that an alien has re-entered the U.S. illegally after having been removed or having departed voluntarily under an order of removal, the prior order of removal is reinstated from its original date and the alien is not eligible and may not apply for any relief under the Act. INA § 241(a)(5). However, the alien preserves ability to apply for withholding of removal after a prior order of removal is reinstated. *Ismaiel v. Mukasey*, 516 F.3d 1198, 1204 (10th Cir. 2008).

If the Department reinstates an alien's prior order of removal and the alien expresses a fear of returning to home country, he or she is given a reasonable fear interview. 8 C.F.R. § 1208.31(a)-(b). After the interview, there are two outcomes: if a positive reasonable fear is found, the asylum officer refers the case to the immigration court for withholding-only proceedings; or if a negative reasonable fear is found, the alien has the right to have that finding reviewed by an immigration judge. 8 C.F.R. §§ 1208.31(e)-(f).

Cases:

Luna-Garcia v. Holder, 777 F.3d 1182 (10th Cir. 2015) ("Based on the foregoing, we conclude that, where an alien pursues reasonable fear proceedings following the reinstatement of a prior order of removal, the reinstated removal order is not final until the reasonable fear proceedings are complete.").

Matter of I-S & C-S-, 24 I&N Dec. 432 (BIA 2008) (holding that an order granting withholding of removal must include an explicit order of removal because "in order to withhold removal, there must first be an order of removal that can be withheld").

RELIGION

Religion is a protected ground under the INA. INA § 101(a)(42); *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

Cases:

De Maerschalck v. Gonzales, 159 Fed. App'x 29 (10th Cir. 2005) (unpublished) (held that substantial evidence supported finding that aliens were not persecuted in Belgium on account of their religion).

Matter of L-K-, 23 I&N Dec. 677 (BIA 2004) (finding that "the harm she suffered, primarily as a result of home invasions during which she was seriously injured, was on account of her religious beliefs and practices, and that it rose to the level of persecution" and determining that "the respondent suffered past persecution and is entitled to the resulting regulatory presumption that she has a well-founded fear of future persecution if she must return to Ukraine").

Matter of O-Z- & I-Z-, 22 I&N Dec. 23 (BIA 1998) (an alien who suffered repeated beatings and received multiple handwritten anti-Semitic threats, whose apartment was vandalized by anti-Semitic nationalists, and whose son was subjected to degradation and intimidation on account of his Jewish nationality established that he has suffered harm which, in the aggregate, rises to the level of persecution as contemplated by the Immigration and Nationality Act).

Matter of S-A-, 22 I&N Dec. 1328 (BIA 2000) (a woman with liberal Muslim beliefs established by credible evidence that she suffered past persecution and has a well-founded fear of future persecution at the hands of her father on account of her religious beliefs, which differ from her father's orthodox Muslim views concerning the proper role of women in Moroccan society).

Matter of Chen, 20 I&N Dec. 16 (BIA 1989) (granting relief to the son of a Christian minister who was subjected to atrocious persecution, including burns to his body, house arrest, and a prohibition on school attendance).

RETURNING/DEPORTEES FROM THE U.S. (PSG)

Typically, proposed social groups based on being a "deportee" or "Americanized" fail to be cognizable because they lack immutability, particularity, and social distinctness. *See Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014) (holding those deported from the United States are not generally recognized to be members of a particular social group either.) The Tenth Circuit has not yet ruled on whether a proposed group of persons returning after a long residence abroad or in the US and who are perceived to be wealthy constitutes a particular social group.

Cases:

Matter of A-M-E-& J-G-U-, 24 I&N Dec. 69 (BIA 2007) (holding Americanization is an amorphous character that does not provide an adequate benchmark for determining group membership).

Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014) (holding those deported from the United States are not generally recognized to be members of a particular social group either).

(b) (6) (BIA Feb. 2, 2015) (extortion for perceived or actual wealth based on repatriation from the United States is not persecution).

Sample Language

(b) (5)

(b) (5) [redacted]

RIGHT TO COUNSEL

The right to counsel in immigration proceedings derives from the Due Process Clause, the Act, and the regulations promulgated under the Act, and entitles an alien to obtain counsel at his own expense. INA § 240(b)(4); 8 C.F.R. §§ 1240.4, 1292. Under the regulations, the Immigration Judge must advise the alien of his right to counsel at no expense to the Government, require him to state whether he desires representation, advise him of the availability of free legal services programs, and ascertain that he has received a list of such programs. *Id*.; *see Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996)

Cases:

Molina v. Holder, 763 F.3d 1259 (10th Cir. 2014) (for a due-process claim based on ineffectiveness of counsel, an alien must show that (1) retained counsel was ineffective, and (2) the ineffectiveness resulted in a "fundamentally unfair proceeding").

Tang v. Ashcroft, 354 F.3d 1192 (10th Cir. 2003) ("While an alien does not have a right to appointed counsel, he does have a Fifth Amendment right to a fundamentally fair proceeding.").

Osei v. INS, 305 F.3d 1205 (10th Cir. 2002) ("This court has recognized that the Fifth Amendment guarantees aliens subject to deportation the right to a fundamentally fair deportation proceeding.").

Matter of Madrigal-Calvo, 21 I&N Dec. 323 (BIA 1996) (the respondent's right to counsel was not violated where the Immigration Judge properly informed the respondent of his right to counsel and provided him with adequate opportunity to obtain representation).

SERIOUS NONPOLITICAL CRIME BAR TO ASYLUM AND WITHHOLDING

An alien may be barred from obtaining asylum and withholding of removal when "there are serious reasons for believing that the alien committed a serious nonpolitical crime" before arriving in the United States. *See* INA § 208(b)(2)(A)(iii); *see also* INA § 241(b)(3)(B)(iii).

Neither the Immigration and Nationality Act (INA) nor the Federal Regulations provide any further guidance as to what constitutes serious reasons for believing that the alien committed a "serious nonpolitical crime." *See* INA § 208(b)(2)(A)(iii). However, the BIA provided a framework for analyzing the serious nonpolitical crime bar. *See Matter of E-A-*, 26 I&N Dec. 1, 3 (BIA 2012). The first step is to consider whether the criminal conduct is of "an atrocious nature." *Id*. If not, the next step in the inquiry is to balance the seriousness of the criminal acts against the political aspect of the conduct to determine whether the criminal nature of the alien's acts outweighs their political character. *Id*. There is no requirement that serious physical harm to others occur for conduct to rise to the level of a serious nonpolitical crime, but it is a significant consideration. *Id*. at 5. The Court must consider whether:

> (1) the act or acts were directed at a governmental entity or political organization, as opposed to a private or civilian entity;

(2) they were directed toward modification of the political organization of the State; and
(3) there is a close and direct causal link between the crime and its political purpose. *Id*.

Cases:

Matter of E-A-, 26 I&N Dec. 1 (BIA 2012) (holding that where an applicant was involved with a group that burned passenger buses and cars, threw stones, and was disruptive for the purpose of discrediting opposition party, that these actions were serious criminal conduct and were characterized as serious nonpolitical crimes).

SEXUAL ASSAULT AS PERSECUTION

Asylum is not a remedy for private acts by one citizen or group of citizens against another. *Matter of A-B-*, 27 I&N Dec. 316, 337-38 (A.G. 2018). It only affords international protection in cases were "the bonds of trust, loyalty, protection, and assistance existing between a citizen and his country have been broken and have been replaced by the relationship of an oppressor to a victim." *Matter of Acosta*, 19 I&N Dec. 211, 235 (BIA 1985).

Cases:

Halmenschlager v. Holder, 331 Fed. App'x 612 (10th Cir. 2009) (affirming denial of asylum where a homosexual man claimed that teenagers exposed themselves to him at age five or six, a man exposed himself and fondled him at age seven, and a male neighbor exposed himself at age sixteen).

Matter of D-V-, 21 I&N Dec. 77 (BIA 1993) (finding past persecution where alien had been gang-raped and beaten).

Sample Language

[(b) (5)

(b) (5)
[redacted]

SEXUAL ORIENTATION (PSG)

The Board has found that sexual orientation can be the basis for establishing a particular social group for asylum purposes. *See Matter of M-E-V-G-*, 26 I&N Dec. 227, 240 (BIA 2014).While other circuits have found that homosexuals are members of a particular social group, the Tenth Circuit has been silent on this issue. *See Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (all alien homosexuals are members of a particular social group).

Cases:

Razkane v. Holder, 562 F.3d 1283 (10th Cir. 2009) (holding that comments of immigration judge resulted in the appearance of bias or hostility that precluded meaningful review by Court of Appeals).

Halmenschlager v. Holder, 331 Fed. App'x 612, 614 (10th Cir. 2009) (determining that an asylum applicant's request was properly denied because, inter alia, (1) the most troubling incidents occurred before his homosexuality was apparent to others and without any connection to action or inaction by the government or entities or individuals it was unable or unwilling to control, (2) other than childhood "beatings" at the hands of other children, he related no instance of violence directed toward him because of his sexual preference, and (3) although he showed that homosexuals may be mistreated in Brazil, neither his testimony nor the documentary evidence required a finding that he faced persecution if returned to Brazil).

Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014) (explaining that the immutable characteristic of "homosexuality" can define a particular social group in a country for sociopolitical or cultural reasons).

Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990) ("Characteristics which cause people to identify him as homosexual are beyond his power to change and are so fundamental to his identity and conscience that he ought not to be required to change.").

Sample Language

(b) (5)
[redacted]

SINGLE MOTHERS/WOMEN WITHOUT MEN (PSG)

This proposed group also faces challenges in establishing that any harm suffered is "on account" of this proposed group. In other words, individuals or gangs may have been more willing and more easily able to target an individual because of her status as a woman living alone with children, which by itself does not signify they sought to harm her specifically because of that fact.

Cases:

Matter of M-E-V-G-, 26 I&N Dec. at 250 (stating that although "certain marginalized social groups may be specifically targeted by gangs, it is also noted that 'a key function of gangs is criminal activity'").

SMALL BUSINESS OWNERS/EMPLOYMENT (PSG)

Typically, Courts have declined to recognize business owners targeted by criminal gangs as a cognizable particular social group because this group fails immutability and particularity. *See Matter of Acosta*, 19 I&N Dec. 211, 234 (BIA 1985) (holding that taxi drivers who refuse gang pressures was not a cognizable PSG because the respondent could change his employment).

Cases:

Torres-Rivera v. Sessions, 706 Fed. App'x 482 (10th Cir. 2017) (holding respondent failed to provide reasonably available corroborating evidence related to his claim of past persecution by gangs based on his membership in the group, "small business owners of the Torres family originating from Sonsonate, El Salvador").

STATELESSNESS

The statute defines a "refugee" as including "in the case of a person having no nationality, is outside any country in which such person last habitually resided." INA § 101(a)(42)(A). Before deciding an asylum claim, the applicant's nationality must be addressed. Inability to establish nationality cannot be a basis to deny asylum status. *Dulane v. INS*, 46 F.3d 988, 996-99 (10th Cir. 1995) (reversing denial of asylum based on failure to establish nationality.)

An applicant may designate a country of removal subject to certain limitations. *See* 8 U.S.C. § 1231(b)(2)(A)-(B). If an applicant does not designate a country or is not removed to his designated country, the applicant shall be removed "to a country of which the alien is a subject, national, or citizen." 8 U.S.C. § 1231(b)(2)(D); *see also* INA § 241(b)(2)(E). If an applicant is not removed to a country under section 1231(b)(2)(D), the alien shall be removed to any of the following countries:

(1) The country from which the alien was admitted to the United States.
(2) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.
(3) A country in which the alien resided before the alien entered the country from which the alien entered the United States.

(4) The country in which the alien was born.
(5) The country that had sovereignty over the alien's birthplace when the alien was born.
(6) The country in which the alien's birthplace is located when the alien is ordered removed.
(7) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

TERRORISM BAR TO ASYLUM AND WITHHOLDING OF REMOVAL

If an alien is subject to the "terrorism bar" under section 208(b)(2)(A)(v), then the alien is barred from asylum. The terrorism bar applies to withholding of removal as well as asylum. INA § 241(b)(3)(B)(iv). An alien is also ineligible for withholding of removal under the CAT if he is subject to the terrorism bar. *See* 8 C.F.R. 1208.16(d)(2).

This bar includes aliens who are members of a "terrorist organization." INA § 208(b)(2)(A)(v). A "terrorist organization" under this section includes any group of two or more people, regardless of whether it is organized as such, that "engages in terrorist activity," or has a subgroup that engages in such activity. INA § 212(a)(3)(B)(vi)(III). The prohibited activities include committing or inciting the commission of a "terrorist activity," provided it is under circumstances indicating an intention to cause death or serious bodily injury. INA § 212(a)(3)(B)(iv)(I). "Terrorist activity" includes any activity that is (1) either unlawful in the place it was committed or would be unlawful under the laws of the United States and (2) involves the use of any "explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property." INA § 212(a)(3)(B)(iii)."Engaging in terrorist activity" can also include soliciting any individual to join a "terrorist organization" as described above. INA § 212(a)(3)(B)(iv)(V)(cc). If an alien "can demonstrate by clear and convincing evidence" that he "did not know, and should not reasonably have known," that the organization he joined or solicited others to join was a "terrorist organization," he will not be barred from relief under this section. INA § 212(a)(3)(B)(i)(VI), (iv)(V)(cc).

Cases:

Matter of S-K-, 23 I&N Dec. 936, 941 (BIA 2006) (finding that "Congress intentionally drafted the terrorist bars to relief very broadly . . . and it did not intend to give us discretion to create exceptions").

Matter of M-H-Z-, 26 I&N Dec. 757, 764 (BIA 2016) (holding that the material support bar in section 212(a)(3)(B)(iv)(VI) of the Act includes no exception for duress).

Sample Language

(b) (5) [redacted]

(b) (5)
[redacted]

UNWILLING OR UNABLE TO CONTROL

In order to prevail on a claim for asylum, the alien must be unable or unwilling to return to his country of nationality or to the country in which he last habitually resided because of persecution or his well-founded fear of persecution. 8 C.F.R. § 208.13(b)(2); *Matter of Acosta*, 19 I&N Dec. 211, 219 (BIA 1985) (construing persecution as requiring that the claimed harm must be inflicted by the government of a country or by persons that the government is unable or unwilling to control).

An applicant "must show more than difficulty controlling private behavior," rather the alien must establish "the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims." *Matter of A-B-*, 27 I&N Dec. 316, 337 (A.G. 2018) (quoting *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005); *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000)) (quotation marks omitted). Consideration should be given to whether respondent sought help from authorities, evidence of successful intervention and prosecution of persecutor in other instances, whether respondent afforded the police time to intervene (did the respondent move to a different area which resulted in the abandonment of his or her complaint?), the alleged persecutor's perception of police and any fear of repercussion for persecution (i.e. did the persecutor tell the applicant not to go to the police), whether government actors commit or instigate or condone the acts, and proximity/accessibility of authorities or police station.

Cases:

Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018) (holding evidence that "a country may have problems effectively policing certain crimes or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim").

Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008) (holding the applicant failed to demonstrate that the Honduran government was unable or unwilling to protect him from gang members).

Matter of A-M-, 23 I&N Dec. 737 (BIA 2005) (finding that the record did not establish that the threat of harm to Chinese Christians in Indonesia by the Government, or by forces that the Government is unable or unwilling to control, is so systemic or pervasive as to amount to a pattern or practice of persecution).

Matter of O-Z-& I-Z-, 22 I&N Dec. 23 (BIA 1998) (upholding grant of asylum where respondent reported at least three incidents to police who took no action beyond writing a report).

Matter of Kasinga, 21 l&N Dec. 357 (BIA 1996) (finding government of Togo was unable and unwilling to protect the alien from persecution based on evidence that FGM is widely practiced in Togo, the police tolerate acts of violence and abuse against women, the country of Togo has a poor human rights record, and it is generally accepted that the government provides little protection to women).

Matter of McMullen, 17 I&N Dec. 542 (BIA 1980) (finding the record did not establish that the government of Ireland was unable or unwilling to protect the applicant from the Provisional Irish Republican Army).

Sample Language (Denial)

(b) (5)
[redacted]

Sample Language (Grant)

(b) (5)
[redacted]

UNTIMELY OR NON-FILED APPLICATIONS/ DOCUMENTS/INFORMATION

The IJ has authority to set filing deadlines for applications and related documents. *See* 8 C.F.R. § 1003.31(c); Immigration Court Practice Manual, Section 3.1 (b) at 34. The regulations also provide that an application or document not filed within the time set by the IJ will be deemed

abandoned. 8 C.F.R. § 1003.31(c); *Matter of R-R-*, 20 I&N Dec. 547, 549 (BIA 1992); *Matter of Interiano-Rosa*, 25 I&N Dec. 24, 26 (BIA 2010).

The Board has held that applications for benefits under the Act are properly denied as abandoned when the alien fails to timely file them. *See Matter of Jean*, 17 I&N Dec. 100 (BIA 1979).

Cases:

Cifuentes v. Holder, 506 Fed. App'x 851 (10th Cir. 2013) (unpublished) (holding that IJ decision that the respondent had waived opportunity to file for NACARA was proper).

Kaitov v. Holder, 483 Fed. App'x 476 (10th Cir. 2012) (unpublished) (an important reason for requiring that documents be submitted well before the hearing is to enable government authorities to check their authenticity and the court upheld IJs refusal to allow late submissions due to the respondent's failure to establish good cause for the late documents).

Matter of R-R-, 20 I&N Dec. 547 (BIA 1992) ("Immigration Judges have authority to set filing deadlines for applications and related documents. An application or document that is not filed within the time established by the Immigration Judge may be deemed waived.")

Matter of Interiano-Rosa, 25 I&N Dec. 24 (BIA 2010) (holding where an application is timely filed but related documents are not timely filed, the proper course for the IJ is to deem the alien's opportunity to file these documents waived and to determine what effect the failure to present them had on his ability to meet his burden of establishing that he or she is eligible for the relief sought).

Matter of Jean, 17 I&N Dec. 100 (BIA 1979) (holding where respondent had over 5 months while his deportation proceeding was adjourned in which to present his claims for asylum and withholding of deportation but failed to file such claims, the immigration judge properly concluded the deportation hearing).

Matter of Balibundi, 19 I&N Dec. 606 (BIA 1988) (holding when a hearing is scheduled to consider an application for relief by a respondent and the respondent fails to appear at the hearing, the application should be deemed abandoned).

Matter of Shanu, 23 I&N Dec. 754 (BIA 2005) ("Applications for benefits under the Immigration and Nationality Act—including applications for cancellation of removal—are properly denied as abandoned when the applicant fails to file them in a timely manner.").

Sample Language

(b) (5) [redacted]

VOLUNTARY DEPARTURE

Voluntary departure permits an individual who is otherwise removable to depart from the country at their own expense within a designated amount of time, in order to avoid a final order of removal. INA § 240B. An alien may request voluntary departure prior or at the conclusion of proceedings. *Id*.

A respondent who applies for pre-conclusion voluntary departure must waive or withdraw a request for asylum, concede removability, waive appeal of all issues, and demonstrate that he has not been convicted of an aggravated felony. 8 C.F.R. § 1240.26(b)(1)(i)(B), (D), (E); *Matter of Arguelles-Campos*, 22 I&N Dec. 811, 815 (BIA 1999).

A respondent who is denied relief for asylum, withholding of removal, and protection under the CAT, but applies for post-conclusion voluntary departure must demonstrate: he has been physically present in the United States for at least one year prior to service of the NTA; is and has been a person of good moral character for at least five years preceding the application for voluntary departure; is not removable under INA § 237(a)(2)(A)(iii) (aggravated felony) or 237(a)(4) (security grounds); establishes by clear and convincing evidence that he has the means to depart and the intention to do so; and merits a grant of voluntary departure as a matter of discretion. INA § 240B(b)(1); 8 C.F.R. § 1240.26(c).

Both asylum and voluntary departure are discretionary forms of relief, however, the Immigration Judge has broader discretionary authority to grant voluntary departure before the conclusion of removal proceedings under section 240B(a) than under section 240B(b). The respondent's immigration and criminal history, length of residence and family ties in the United States, humanitarian factors, and other evidence of character may be relevant to the exercise of discretion. *See Matter of Gamboa*, 14 I&N Dec. 244, 248 (BIA 1972); *Arguelles-Campos*, 22 I&N Dec. at 818.

Cases:

Sviridov v. Ashcroft, 358 F.3d 722 (10th Cir. 2004) (denying an asylum applicant's request for a stay of voluntary departure where the BIA, affirming an IJ's decision, granted the applicant 30 days to depart from the United States).

Pardede v. Holder, 342 Fed. App'x 391 (10th Cir. 2009) (finding that the court lacked jurisdiction to review petitioners' asylum and voluntary-departure issues).

Wambugu v. Gonzales, 140 Fed. App'x 7 (10th Cir. 2005) (the Tenth Circuit held that it does not have jurisdiction to review a judgment regarding the granting of voluntary relief).

WEALTH & PERCIEVED WEALTH (PSG)

Wealth is likely not immutable, wealthy individuals lack visibility, and a proposed group based on wealth alone is too amorphous. *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74 (BIA 2007) (finding "wealthy Guatemalans" was not a particular social group); *Matter of V-T-S-*, 21 I&N Dec. 792, 799 (BIA 1997) (holding that an alien is ineligible for asylum if the persecutor's motivation is to acquire the alien's wealth).

As the type of persecution may inform whether a group is visible, evidence demonstrating wealthy individuals are at greater risk of extortion or robbery in particular would indicate visibility. *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74 (BIA 2007).

Cases:

Delcid-Zelaya v. Holder, 534 Fed. App'x 694 (10th Cir. 2013) (finding "El Salvadorans who are returning to El Salvador from the United States and perceived to be wealthy" do not constitute a particular social group).

Quinonez v. Ashcroft, 102 Fed. App'x 114 (10th Cir. 2004) (the court noted that it was reasonable for the IJ to find that the guerrillas' interest in the husband was not his rather vague political views but something else, such as his wealth or his position in the car dealership).

(b) (6) (BIA Mar. 3, 2017) (finding perceived wealth is not a PSG).

WELL-FOUNDED FEAR OF FUTURE PERSECUTION

An applicant who has established past persecution, is entitled to a presumption the applicant has a well-founded fear of persecution. 8 C.F.R. § 1208.13(b)(1). DHS can overcome this preponderance by establishing that (1) that since the time the persecution occurred conditions in the applicant's country of nationality or last habitual residence have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he were to return, or (2) that the applicant could safely relocate elsewhere in the country. 8 C.F.R. § 1208.13(b)(1)(i)

If an applicant has established past persecution, and the record reflects that country conditions have changed to such an extent that the asylum applicant no longer has a well-founded fear of persecution from his original persecutors, the applicant can:

> (a) Demonstrate that he or she has a well-founded fear of persecution from any new source (*Matter of N-M-A-*, 22 I&N Dec. 312 (BIA 1998)); or
>
> (b) Demonstrate that he or she warrants a grant of humanitarian asylum based on the severity of the past persecution or a risk of "other serious harm." *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012); *see also Matter of B-*, 21 I&N Dec. 66 (BIA 1995); *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989). [*See* Humanitarian Asylum]

If the applicant cannot demonstrate past persecution, he or she may establish eligibility for asylum if he or she: (1) Has a fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion; (2) there is a reasonable possibility that he or she would suffer such persecution if returned to his country of nationality; and (3) he or she is unable or unwilling to avail him or herself of the protection of that country based on that fear. 8 C.F.R. § 1208.13(b)(2)(i)(A)-(C).

A well-founded fear of persecution must be both subjectively genuine and objectively reasonable. *Yuk v. Ashcroft*, 355 F.3d 1222, 1233 (10th Cir. 2004); *Matter of Y-B-*, 21 I&N Dec. 1136, 1149 (BIA 1998). An applicant may establish a subjective fear of persecution based on credible testimony. To meet the objective component, the respondent must show by specific and concrete evidence in the record. *Id*.

Cases:

Wiransane v. Ashcroft, 366 F.3d 889 (10th Cir. 2004) (alien's fear based on harm on account of his ethnicity was not supported by credible evidence in the record).

Sadeghi v. INS, 40 F.3d 1139 (10th Cir. 1994) (Iranian native seeking asylum and withholding of deportation failed to carry his burden of proving that Iranian government sought him for purposes of persecution, rather than for the legitimate purpose of criminal prosecution).

Motamedi v. INS, 713 F.2d 575 (10th Cir.1983) (remanding asylum claim to BIA for consideration of new evidence; Iranian petitioner came to the United States as a student prior to Iranian Revolution, and based claims of fear on anti-Khomeini demonstrations in which he participated while in the United States).

Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987) (a reasonable person standard is used in well-founded fear determinations).

Matter of A-E-M-, 21 I&N Dec.1157, 1160 (BIA 1998) (holding that the reasonableness of an alien's fear of persecution is reduced when his family remains in his native country unharmed for a long period of time after his departure).

Sample Language

(b) (5) [redacted]

WITHHOLDING OF REMOVAL

Unlike asylum, a claim for "withholding of deportation must be granted if the Attorney General determines that the applicant's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion by deportation." *Krastev v. INS*, 292 F.3d 1268, 1270 (10th Cir. 2002) (affirming the BIA's decisions, in part, that two Bulgarian applicants were not eligible for humanitarian asylum or withholding of deportation).

The applicant or applicants must establish a clear probability of persecution on one of the specified grounds to qualify for withholding of deportation, which is a higher standard than is applicable to a request for asylum." *Id*.

Cases:

Estrada-Escobar v. Ashcroft, 376 F.3d 1042 (10th Cir. 2004) (holding that because the asylum applicants failed to meet the standard for asylum, they also failed to establish the higher and more difficult standard for withholding of deportation, which requires that they establish "a clear probability of persecution on one of the specified grounds").

Batalova v. Ashcroft, 355 F.3d 1246 (10th Cir. 2004) (holding that "having failed to establish entitlement to asylum, the aliens also failed to establish entitlement to withholding of removal which required a petitioner to meet a higher standard than that for asylum.").

Hang Kannha Yuk v. Ashcroft, 355 F.3d 1222 (10th Cir. 2004) (an applicant is entitled to withholding of removal if he or she can show a clear probability of persecution which courts have acknowledged is a higher standard than that for asylum.).

Torres-Rivera v. Sessions, 706 Fed. App'x 482, 483 (10th Cir. 2017) (finding that the BIA did not err in holding that petitioner's testimony was insufficient to show that he was, in fact, a store owner in El Salvador because under 8 U.S.C.S. § 1158(b)(1)(B)(ii), he failed to explain the lack of what should have been readily available evidence substantiating that claim).

Seka v. Sessions, No. 17-9521, 2017 U.S. App. LEXIS 23293, at *15 (10th Cir. Nov. 20, 2017) (affirming the BIA decision's that because the applicant had not met the standard for asylum, he has also not met the more stringent standard for withholding of removal).

Rosales-Rodriguez v. Holder, 548 Fed. App'x 536, 539 n.2 (10th Cir. 2013) (noting that to prevail on an application for restriction on removal, an alien must establish that he will "more likely than not" be persecuted upon returning to his country).

WITNESSES & INFORMANTS (PSG)

Generally, those who directly witness a murder and are threatened if they report the murder to government authorities are not a legally cognizable "particular social group." *See Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006).

Cases:

Rodriguez-Leiva v. Holder, 607 Fed. App'x 807 (10th Cir. 2015) (holding Guatemalans who directly witnessed murders and were threatened if they reported murders to government authorities did not constitute a legally cognizable particular social group for purposes of withholding of removal).

Matter of C-A-, 23 I&N Dec. 951 (BIA 2006) (holding that a group composed of "noncriminal informants" did not meet the particularity requirement). The BIA also determined that a narrower group defined as "noncriminal drug informants working against the Cali drug cartel" also did not constitute a particular social group due, in part, to the proposed group's lack of social distinction. *Id*. at 961.

Sample Language

(b) (5)

(b) (5)